79-1288

Supreme Court of the United States

Supreme Court, U. S.
FILED
FEB 20 1980
MICHAEL RODAK, JR., CLERK

October Term, 1979

No. .....

ETHAN WILT and HEATHER WILT, TERESA RACINSKAS and ADAM RACINSKAS, CHRISTOPHER BOEMAN and THOMAS BOEMAN, KATHLEEN TOKE, SHAWN MACK and ANDREA MACK, REGINA HARRIS, DEJONA CEASOR, CORA OWENS, TIMOTHY J. COSGROVE, DANIEL WILT and PEGGY WILT, BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Petitioners,

vs.

STATE BOARD OF EDUCATION, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, SUPERINTENDENT OF PUBLIC INSTRUCTION, BOARD OF EDUCATION, CLEVELAND CITY SCHOOL DISTRICT, VINCENT C. CAMPANELLA, AUDITOR OF CUYAHOGA COUNTY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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February 12, 1980

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Text

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioners, above-named, petition the Court to issue its Writ of Certiorari to review the judgment in cause No. 79-3580, United States Court of Appeals for the Sixth Circuit, by Circuit Judges Engel, Merritt, and Peck, affirming the summary judgment entered against Petitioners by United States District Judge Manos in the Northern District of Ohio in an action claiming rights under the Civil Rights Act of 1871, 42 U.S.C. §§1985(3), 1981, 1982 and 1983-1988, and in support thereof say:

OPINIONS BELOW

The opinion by District Judge Manos, granting summary judgment before trial in favor of Respondents, is not reported but is reproduced in the Appendix hereto under separate cover (A9); the opinion of the United States Court of Appeals for the Sixth Circuit is reported in 608 F.2d 1126, and is reproduced in the Appendix. (A2.)

JURISDICTION

The judgment sought to be reviewed was dated and entered November 2, 1979 (A2); Petition for Rehearing was denied November 28, 1979. (A1.)

This Court has jurisdiction to review upon Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

The case brings here for review the questions:

1. Whether a State Supreme Court judgment (in a statutory administrative review of a State Board of Education ruling) holding the State Court had no jurisdiction to hear the case may be treated by a Federal Court as res judicata, not only of the jurisdictional issue, but also of issues going to the merits.

2. Whether a Federal Court in determining the effect of a State Court judgment for res judicata purposes, may disregard law settled in that State for 122 years, *i.e.*, that the Court-prepared syllabus, and not the opinion, states the law of the case and that

the opinion states only the individual views of its author.

3. Whether a Federal Court (by dint of enlarging the decision of the State Supreme Court in defiance of the syllabus rule) may hold a school district was dissolved eight years earlier (in 1970) in disregard of a separate State Court Declaratory Judgment of August 30, 1973, that (A39) "The Bratenahl Local School District legally exists" when that judgment is final and unmodified.

4. Whether it is consistent with a meaningful Federal judicial system to let a case make its way through courts and administrative agencies for nearly ten years without ever examining the merits—except once, and then disregarding the judgment based on the one review that involved study of the merits.

CONSTITUTION AND STATUTES INVOLVED

The case challenges the denial by a State of equal protection of the laws and due process under the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1871, 42 U.S.C. §§1985(3), 1981, 1982 and 1983-1988.

The Fourteenth Amendment, §1, says:

> "No State shall * * * deprive any person of * * * property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Although rights are claimed under the Civil Rights Act of 1871, that statute is not relevant in the present posture of the case and is not here copied because the case in both courts below went off on the issue of res judicata without reaching the Civil Rights Act.

STATEMENT OF THE CASE

This action, claiming rights under the Civil Rights Act of 1871, is, as the Court of Appeals noted, brought by Bratenahl Local School District Board of Education *and*:

> "12 individuals who were either Bratenahl taxpayers, students presently enrolled in the schools in Bratenahl, or former students of the Bratenahl school system, and who similarly claim that their civil rights have been violated by the compelled annexation of the Bratenahl School District to the Cleveland School District." 608 F.2d at 1128. (A4-5.)

The United States District Court granted Summary Judgment against Petitioners, without hearing any evidence or considering the merits of Petitioners' Civil Rights claims, on the ground that a decision of the Ohio Supreme Court is res judicata of the issues sought to be raised. The Court of Appeals affirmed on the ground that:

> "in *State ex rel. Board of Education of Bratenahl Local School District v. State Board of Education*, 53 Ohio St.2d 173, 373 N.E.2d 1238, cert. denied, 439 U.S. 865 (1978) (Bratenahl I), the Supreme Court of Ohio expressly held that '[t]he Bratenahl Local School District was properly dissolved on July 1, 1970, by the State Board.'" 608 F.2d at 1127. (A4.)

Had the Supreme Court of Ohio so held, this case would not be here.

It is here because the case was brought to a jarring halt by the Federal Court's enlargement of the Ohio Supreme Court judgment in disregard of the syllabus rule of 122 years standing.

By disregard of that rule the decision by the Ohio Supreme Court that the State Court *had no jurisdiction* of

a statutory administrative review proceeding is, *ipse dixit*, transformed into a decision on the merits of the case. *Where there is no jurisdiction, there can be no adjudication binding as res judicata—except only on the point that the court lacked jurisdiction.*

The tragedy is that the record presents a classic issue of res judicata by final judgment, unreversed, unmodified, and now unreviewable, entered on August 30, 1973, by the State Court in a separate Declaratory Judgment action adjudging, contrary to the holding of the Federal Court, that the Bratenahl School system was *not* dissolved in 1970, but to the contrary, and as a matter of law, "legally exists" *three years later.*

That judgment remains outstanding, unreviewed, and unmodified. It requires, if the rule of res judicata is not to be reduced to rubble, reversal of the judgment below and remand of the case to the District Court for trial on the merits of the tendered civil rights issues.

The State Court Declaratory Judgment action:

was filed in the State Court of Common Pleas on November 29, 1971. (A21.)

was dismissed by the Common Pleas Court on April 29, 1972. (A25.)

was reversed by the Franklin County Court of Appeals on January 9, 1973. (A28.) The Court of Appeals, despite (A35) "the persistence of the State Board in its efforts to avoid determination on the merits," adjudged (A33) "Bratenahl *in fact does exist* and is operating as a school district and at present maintains grades 1 through 12, inclusive * * *."*

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*Emphasis supplied throughout.

was denied review on April 30, 1973, by the Supreme Court of Ohio when it overruled the State Board's motion to certify the record for review. (A36.)

was remanded to the Common Pleas Court where on August 8, 1973, upon finding (A37) "that there is no genuine issue as to any material fact and that Bratenahl, the moving party is entitled to judgment as a matter of law," the trial court determined that (A37) "the Bratenahl Local School District does legally exist." Accordingly, "Bratenahl's Motion for Summary Judgment is SUSTAINED. Counsel for Plaintiff may prepare an Entry consistent with this decision." (A37.)

was finally disposed of by Judgment (A38) entered August 30, 1973, adjudging that (A39) "The Bratenahl Local School District legally exists * * *."

No review of that Judgment was sought. It remains oustanding, unmodified, and in full effect.

REASONS FOR ALLOWANCE OF WRIT

In the exercise of its supervisory power over the Federal courts, and to rescue the rule of res judicata from the confusion into which the decision below reduces that salutary rule, this Court should grant review. It then should summarily remand the case to the District Court with instructions to hear and pass upon the merits of Petitioners' civil rights claims.

Public policy emphasizes need for review. Here is a first-rate school system, successfully operating a fully integrated, quality educational program where more than 25% of the pupils are black. That system is threatened

with destruction solely as the result of grievous misconstruction by the Federal Court of State Court proceedings and in defiance of an outstanding final judgment that, on classic res judicata grounds, brands the decision below as hopelessly wrong.

If order is not restored to the rule of res judicata, Petitioners' civil right under the 1871 Civil Rights Act are destroyed.

Although, absent jurisdiction, there can be no adjudication on the merits, the astonishing, and sad, fact is that in this case—

1. Judgment That Court Had No Jurisdiction Has Been Treated as Decision on Merits

In the State administrative review proceeding that the Federal Court relied upon to establish res judicata, *State ex rel. Board of Education of Bratenahl Local School District v. State Board of Education* (1978), 53 Ohio St. 2d 173, 373 N.E.2d 1238 (hereinafter *Bratenahl I*) (A69), the Supreme Court of Ohio in the court-prepared syllabus—and, as will be seen in a moment, it is the syllabus and *not the opinion* that states what the Court has decided—held as follows:

"1. The refusal of the State Board of Education to grant a local school district an additional exception to the requirements of R.C. 3311.29 *does not constitute an 'adjudication'* within the meaning of R.C. 119.01(D).

2. In the absence of an 'adjudication' as defined in R.C. 119.01(D), the right to notice and hearing does not obtain and, consequently, in such a case the Court of Common Pleas of Franklin County *lacks jurisdiction* under R.C. 119.12 to review actions taken by a state administrative agency. (*Fortner*

v. Thomas, 22 Ohio St.2d 13; *M.J. Kelley Co. v. Cleveland*, 32 Ohio St.2d 150, approved and followed.)"

Since the State Court was *without jurisdiction, its judgment cannot possibly, on any reasoned basis, be res judicata* of any issue whatever—except only the issue of jurisdiction.

Jurisdiction lacking, whatever is said on the merits lacks the essential quality of adjudication.

The Federal Court, when it fell into its surprising holding, wiped out 122 years of settled Ohio law, as next will be pointed out:

2. Federal Court's Construction of State Decision Wipes Out 122 Years of Ohio Law

It has been law in Ohio since 1858 that the Ohio Supreme Court states the law in the court-prepared syllabus and *not in the opinion*. The opinion is only the private expression of its author. Although in its syllabus the Ohio Supreme Court held the Court *had no jurisdiction*, there crept into the opinion by Mr. Justice Sweeney the single sentence the Federal Court relied upon, namely:

> "the Bratenahl Local School District was properly dissolved on July 1, 1970, by the State Board." 53 Ohio St. 2d at 187. (A75.)

How shocking the miscarriage, transforming this sentence into judgment, will be apparent when one notices that the Ohio Supreme Court's decision issued upon a 4 to 3 vote. Three justices dissented. (A75.) A sentence *no other justice subscribed to* has, in defiance of long-settled rule, been elevated to the status of a judgment of the Court.

The rule that it is the syllabus alone, and not the opinion, that states the law has been repeatedly upheld by this Court in dealing with decisions of the Ohio Supreme Court:

> *Beck v. Ohio* (1964), 379 U.S. 89, 93, Footnote 2, opinion by Mr. Justice Stewart;
>
> *Perkins v. Benguet Consolidated Mining Co.* (1952), 342 U.S. 437, 441-442, Footnote 3, opinion by Mr. Justice Burton;
>
> *Ohio v. Gallagher* (1976), 425 U.S. 257, 259, *per curiam.*

The rule was reaffirmed in *Cassidy v. Glossip* (1967), 12 Ohio St. 2d 17, 231 N.E.2d 64. The Ohio Supreme Court, in Syllabus 6, held:

> "6. The syllabus of a decision of the Supreme Court of Ohio states the law of the case."

In *State, ex rel. Donahey v. Edmondson* (1913), 89 Ohio St. 93, 107-108, 105 N.E. 269, 273, the Ohio Supreme Court refused to follow views stated in opinions, rather than in syllabi, in earlier cases because, as Judge Donahue observed:

> "Where the judge writing an opinion discusses matters or gives expression to his views on questions not contained in the syllabus, *it is merely the personal opinion of that judge.*" 89 Ohio St. at 107-108.

Similarly, because the court below had relied upon a paragraph in a Supreme Court opinion not carried into the syllabus, the Supreme Court of Ohio reversed in *Thackery v. Helfrich* (1931), 123 Ohio St. 334, 336, 175 N.E. 449, 450. Judge Robinson, observing that (p. 336) "This court * * * announces the law only through the syllabi of cases," explained that (p. 336) "Individual opin-

ions speak the conclusions of their writer," and wryly added:

"What useful purpose they [the opinions] serve is an open question." 123 Ohio St. at 336.

This strange rule is so fundamental to an understanding of the legal effect of *Bratenahl I* that it will be useful to note Mr. Justice Burton's explanation of it in *Perkins*, 342 U.S. at 441-442, as follows:

"In 1858 the Supreme Court of Ohio promulgated the following rule:

'A syllabus of the points decided by the Court in each case, shall be stated, in writing, by the Judge assigned to deliver the opinion of the Court, which shall be confined to the points of law, arising from the facts of the case, that have been determined by the Court. And the syllabus shall be submitted to the Judges concurring therein, for revisal, before publication thereof; and it shall be inserted in the book of reports without alteration, unless by the consent of the Judges concurring therein.' 5 Ohio St. vii.

This policy has been recognized by statute. Bates Ohio R.S. §427, as amended, 103 Ohio Laws 1913, §1483, and 108 Ohio Laws 1919, §1483. It appears now in Throckmorton's Ohio Code, 1940, §1483, as follows:

'Whenever it has been thus decided to report a case for publication the syllabus thereof shall be prepared by the judge delivering the opinion, and approved by a majority of the members of the court; and the report may be per curiam, or if an opinion be reported, the same shall be written in as brief and concise form as may be consistent with a clear presentation of the law of the case * * *. *Only* such

cases as are hereafter reported in accordance with the provisions of this section shall be recognized by and receive the official sanction of any court within the state.'

There are many references to this practice, both in the syllabi and opinions written for the Supreme Court of Ohio. Typical of these is the following:

'It has long been the rule of this court that the syllabus contains the law of the case. It is the only part of the opinion requiring the approval of all the members concurring in the judgment. Where the judge writing an opinion discusses matters or gives expression to his views on questions not contained in the syllabus, it is merely the personal opinion of that judge.' * * *."

Under these circumstances it is a non sequitur to say the Ohio Supreme Court decision is res judicata of the issues here.

There was, to be sure, a second Bratenahl case in the Supreme Court of Ohio, not mentioned by the court below, namely *State ex rel. Board of Education of Bratenahl Local School District v. State Board of Education of Ohio* (1979), 58 Ohio St. 2d 189, 389 N.E.2d 503 (hereinafter *Bratenahl II*) (A79), a mandamus action brought by Bratenahl. In a per curiam opinion, which *is* the voice of the Court, the Ohio Supreme Court recognized that in the earlier Bratenahl case it *had adjudged*:

"the Court of Common Pleas *lacked subject matter jurisdiction* * * *." 58 Ohio St. 2d at 191. (A82.)

To hold an adjudication, lacking "subject matter jurisdiction," operates as res judicata of issues on the merits reduces to debris every known theory of res judicata.

In *Bratenahl II* the Supreme Court of Ohio did not hold that *the Court* had adjudged Bratenahl dissolved. To

the contrary, the Court correctly, and properly, distinguished what was in the *syllabus* from what was in the *opinion*. The Court said, referring to *Bratenahl I*:

> "The majority opinion in *State ex rel. Bd. of Edn., supra*, then concluded, at page 178, 'that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the state board.' " (A82.)

Even if the Court in *Bratenahl II* had attributed to *Bratenahl I* (A69) an adjudication that Bratenahl was dissolved, that would be immaterial. *Bratenahl I* stands or falls on its own bottom—i.e., syllabus. Subject matter jurisdiction, adjudged lacking, cannot be retroactively restored by subsequent comment.

The Federal Court, in addition, failed to note that—

3. Federal Decision Conflicts With State Court Declaratory Judgment

The Federal Court held Bratenahl dissolved despite the State Court Declaratory Judgment to the contrary.

The State Court Declaratory Judgment is a final judgment. It is unmodified. It continues outstanding. It is no longer reviewable.

This Court should say whether it is right that a Federal Court ride roughshod over a valid State judgment.

Consider also—

4. If Review Is Denied, Petitioners' Rights Will Never Have Been Judged on Merits

Save for the Declaratory Judgment of August 30, 1973, adjudging Bratenahl "legally exists," Bratenahl's rights have never been adjudicated on the merits.

For nearly ten years of litigation the strategy described by the State Court of Appeals, as "the persistence of the State Board in its efforts to avoid determination upon the merits" (A35), has proved successful.

Unless review be granted here, the rights of these Petitioners never will have been examined by any court—save only in the Declaratory Judgment the Federal Court jettisoned, without explanation.

The parallel that comes to mind is *Pyrot's* case in the *Penguin Island* reports of Anatole France, Book Six, Ch. X, where it developed that some (p. 239):

> "began to doubt whether it was not to their interest to believe in Pyrot's innocence rather than in his guilt, and thenceforward they felt a bitter anguish at the thought that the unhappy man might have been wrongly convicted * * *."

And so it came to pass that the *Pyrot* case was reopened and it fell to Mr. Justice Chaussepied (p. 242):

> "to examine it and discover its defects, in case any existed. Although as upright and honest as a man can be, and trained by long habit to exercise his magistracy without fear or favor, he expected to find in the documents to be submitted to him proofs of certain guilt and of obvious criminality."

And so he examined the documents (p. 242-243):

> "Numbered and initialed, they ran to the number of fourteen million six hundred and twenty-six thousand three hundred and twelve. As he studied them the judge was at first surprised, then astonished, then stupefied, amazed, and, if I dare say so, flabbergasted. He found among the documents prospectuses of new fancy shops, newspapers, fashion plates, paper bags, old business letters, exercise books, brown paper,

green paper for rubbing parquet floors, playing cards, diagrams, six thousand copies of the 'Key to Dreams,' but not a single document in which any mention was made of Pyrot."

So is it here.

Ten years of litigation, commencing February 9, 1970, have gone down the drain, victim of the State Board's "persistence" in avoiding decision on the merits.

The merits have never been studied—except in the Declaratory Judgment the Federal Court passed in silence.

CONCLUSION

The writ should issue to restore order to the judicial system, to rescue from destruction the rule of res judicata, and to establish that a final State judgment is to be respected in Federal Court.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

February 12, 1980

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[1] ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

No. 79-3580

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ETHAN WILT, *et al.*,
Plaintiffs-Appellants,

v.

STATE BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

ORDER

(Filed November 28, 1979)

Before: ENGEL and MERRITT, *Circuit Judges* and PECK, *Senior Circuit Judge.*

Appellants in this case have filed a petition for rehearing with this court. The court has considered the petition and finds that it raises no question not previously considered. Accordingly,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN S. HELMS
Clerk

[2] OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79-3580

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ETHAN WILT, *et al.*,
Plaintiffs-Appellants,

v.

STATE BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

(Decided and Filed November 2, 1979)

Before: ENGEL and MERRITT, *Circuit Judges* and PECK, *Senior Circuit Judge.*

ENGEL, *Circuit Judge.* The Bratenahl Local School District [hereinafter "Bratenahl"] was a small school district bordered on the north by Lake Erie and on all other sides by the Cleveland City School District. In 1967 the Ohio legislature enacted a law, codified as Ohio Revised Code § 3311.29 which provided that after July 1, 1968, any school district which did not maintain within its district public schools consisting of grades 1 through 12 inclusive would be dissolved and its territory joined with another school district or districts. At the time the statute was passed, the Bratenahl School District did not maintain a high school. In 1967 the Ohio State Board of Education required a minimum of 240 high school students for the

creation of a high school. The Bratenahl district did not have this many students at the high school level and, therefore, it operated only grades 1 through 8. Under the terms of Ohio Rev. Code Ann. § 3311.29, therefore, Bratenahl would have ceased to exist as an independent school district on July 1, 1968, unless it was excepted from compliance under the authority which was granted the State Board of Education to "authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable." Bratenahl's request for such an exception was denied.

Faced with the prospect of an immediate automatic dissolution on July 1, 1968, Bratenahl agreed with the Cleveland Superintendent of Schools that it would merge with the Cleveland School District on July 1, 1970, thus in effect receiving a two-year "grace period" in which to effect the change. This agreement was implemented by resolution passed both by Bratenahl on June 8, 1968, and by the State Board on June 10, 1968. During the period of negotiations between Bratenahl and the Cleveland School District, new state standards for the creation of high schools were being formulated. Effective July 1, 1968, the state regulations were changed to delete the 240 minimum pupil requirement and to substitute in place thereof a 55 course unit requirement for schools organized after July 1, 1968. Thus a high school would thereafter be in compliance with state regulations if it maintained 55 units, i.e., courses, in the high school regardless of the number of students enrolled.

While Bratenahl claimed that knowledge of this regulatory change was fraudently withheld from it, we are unable to find support for any claim of deception in this regard. Be this as it may, Bratenahl claims that it had a right within the two-year grace period to create a 55-unit

high school within its own district and thus, in effect, to rescind its agreement to join with the Cleveland School District. Litigation through the Ohio State courts was of no avail and in *State ex rel Board of Education of Bratenahl Local School District v. State Board of Education,* 53 Ohio St. 2d 173, 373 N.E.2d 1238, *cert. denied,* 439 U.S. 865 (1978) (Bratenahl I), the Supreme Court of Ohio expressly held that "[t]he Bratenahl Local School District was properly dissolved on July 1, 1970, by the State Board." *Id.,* 53 Ohio St. 2d at 178.

It would serve no useful purpose to outline the extensive record of litigation which the Bratenahl School District pursued in the Ohio State courts in an effort to preserve its independent identity and to avoid annexation to the Cleveland School District. Any temporary advantage gained in the lower courts of Ohio was for all practical purposes finally lost when the Supreme Court of Ohio adjudicated that Bratenahl had merged with the Cleveland School District and hence had ceased to exist on July 1, 1970. The instant federal litigation is but a further effort to achieve that which failed of achievement in the Ohio courts.

In an action brought in the United States District Court for the Northern District of Ohio, the Bratenahl School District once more sought litigation of these issues by couching them in terms of denials of equal protection and due process under the Fourteenth Amendment of the Constitution of the United States, seeking relief under the Civil Rights Act of 1871, 42 U.S.C. § 1985(3) and §§ 1981, 1982, and 1983-1988. In its action Bratenahl was joined by 12 individuals who were either Bratenahl taxpayers, students presently enrolled in the schools in Bratenahl, or former students of the Bratenahl school system, and who similarly claim that their civil rights have been

violated by the compelled annexation of the Bratenahl School District to the Cleveland School District.

In an opinion rendered from the bench, United States District Judge John Manos entered summary judgment in favor of the defendants and against plaintiffs on their complaint as filed. In so doing, he specifically ruled that the principles of *res judicata* controlled all of the issues except a conspiracy issue which had been raised by the plaintiffs in their complaint. Thus the court specifically applied *res judicata* to the following claims:

> (1) That the August 1973 decision of the Franklin County Common Pleas Court is a final judgment in full force and effect, and that the consequent October 1974, "119" hearing was unconstitutional, mooted by Bratenahl II.
>
> (2) That the State Board deprived the Bratenahl District of its real and personal property without due process, and that the denial of Bratenahl's funding has also been undertaken without due process of law.
>
> (3) That the dissolution of the Bratenahl District was undertaken arbitrarily and to retaliate against Bratenahl for being "too good" and for challenging the State Board in court. Judge Krenzler held that Section 3311.29, Ohio Revised Code, is not arbitrary and that it serves a State interest and is constitutional.
>
> (4) That the plaintiffs were deprived of due process because the State Board has not applied the September 30, 1975, amendment of Section 3311.29, Ohio Revised Code, to the Bratenahl District; mooted by the 1970 dissolution.

(5) That the refusal of the State Board to accredit Bratenahl Schools is unconstitutional; mooted by Bratenahl I and II because there is no need to accredit a school system which does not exist.

(6) That the plaintiffs will be deprived of a sound education by their transfer to an allegedly inferior and unsafe system; mooted because this claim was made by Bratenahl in its 1970 application for a continued exception which the Ohio Courts held was properly denied.

(7) That dissolution of the District without a taxpayer referendum is unconstitutional, unpersuasive because county ordinance authorizing a referendum is not applicable. The State Courts held Section 3311 was properly applied and that section gives no right to a referendum.

In addition to the foregoing claims, the plaintiffs have alleged that the defendants, Cleveland School District and the State Board of Education, conspired to deny the students of the Bratenahl School District a diverse racially integrated educational environment. This claim was based essentially upon findings made by Chief Judge Frank Battisti in *Reed v. Rhodes,* 455 F. Supp. 546 (N.D. Ohio 1978), that the Cleveland School District had been guilty of maintaining a dual, segregated system of education. As to this claim, Judge Manos held that the complaint failed to allege a claim upon which relief could be granted and he accordingly entered judgment in favor of the defendants, dismissing the complaint. This appeal followed.

Upon consideration, this court fully agrees with Judge Manos that the extensive record of litigation in the Ohio State courts is fully and completely dispositive of all claims made by the plaintiffs in the federal case except

that of conspiracy. Plaintiffs may not simply re-litigate state issues under the guise of alleged and unsupported violations of federal constitutional rights. There was no showing whatever that the statute under which the school district was dissolved violated any federally guaranteed constitutional rights of the individual plaintiffs or of the plaintiff school district, nor was there any showing that the exercise of the Board's discretion in declining to grant Bratenahl an exception to the statute was motivated by impermissible considerations or was otherwise invalid.

With respect to the claims of conspiracy, it is manifest that the efforts of Bratenahl to characterize the conduct of the State Board and the City defendants as discriminatory are wholly conclusory, and that plaintiffs have altogether failed in their burden to come forward with a showing that a genuine issue of fact existed with respect to their claim that the State Board and the City Board of Education are conspiring to merge the Cleveland and Bratenahl School Districts because of race. Neither do we know of any case law, nor have we been cited any, which holds that a merger of school districts under state law, which has the incidental effect of creating a more uniform racial mix of students, in itself spells out any form of constitutional grievance on the part of the students of one particular race. This is so even though the action of one school district may, in fact, be motivated by a need to desegregate under the compulsion of charges that it was operating a dual system. Accordingly,

The judgment of the district court is affirmed.

[3] JUDGMENT ORDER OF THE DISTRICT COURT

Case No. C79-1579

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ETHAN WILT, *et al., etc.*,
Plaintiffs,

v.

STATE BOARD OF EDUCATION, *et al., etc.*,
Defendants.

FINAL JUDGMENT ORDER

(Filed August 30, 1979)

IT IS HEREBY ORDERED that pursuant to the oral opinion rendered by the court today, the above-captioned case is dismissed in part and, as to the plaintiffs' other claims, the defendants' motions for summary judgment are granted.

UNITED STATES DISTRICT JUDGE

/s/ JOHN M. MANOS

[4] ORAL OPINION OF THE DISTRICT COURT

No. C 79-1579

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ETHAN WILT, *et al.*,
BRATENAHL BOARD OF EDUCATION,
Plaintiffs,

vs.

THE STATE BOARD OF EDUCATION,
FRANKLIN B. WALTER,
CLEVELAND BOARD OF EDUCATION,
VINCENT C. CAMPANELLA,
Defendants.

ORAL OPINION IN THE ABOVE-ENTITLED CAUSE BY THE HON. JOHN M. MANOS, JUDGE OF SAID COURT, AUGUST 30, 1979.

THE COURT: I have read carefully all the briefs to the extent that it is possible for a human to read all of the material that was submitted.

In 1978 the Supreme Court of Ohio handed down its decision in Bratenahl I, in which it said the Bratenahl school system is dissolved effective July 1, 1978; and a motion to reconsider failed. It was overruled and denied.

A motion for indefinite stay was filed. It was denied with the exception that a brief stay was granted to permit Bratenahl to file an appeal in the United States Supreme

Court. They filed a petition for writ of certiorari and attached to this petition was a motion to stay.

The motion to stay was denied, and the petition was subsequently denied.

On June 28, 1978, the complaint and prohibition and mandamus was filed in the Court of Appeals of Franklin County.

On the day after the day on which it was filed the Court of Appeals of Franklin County dismissed the appeal. Since it was an original action, an appeal was taken to the Ohio State Supreme Court.

In August of 1978, a resident taxpayer of Bratenahl, Mr. Stromberg, failed in an action in the Common Pleas Court of Cuyahoga County, in which he averred that the merger of the Bratenahl School System and the Cleveland School System pursuant to 3311.29 violated the Constitution of the United States and the Constitution of the State of Ohio.

On February the 15th, 1978, Judge Markus, to whom this case was assigned, stayed all proceedings in that action on the ground that the issues before him were the same issues that were before the Supreme Court of the State of Ohio, unappealed from a decision of the Court of Appeals of Franklin County.

On May 16 of 1979, the Ohio State Supreme Court in Bratenahl II affirmed the Court of Appeals in Franklin County, and reiterated its previous conclusion that the Bratenahl School Board was dissolved effective July 1, 1978.

On May 31, Judge Markus dismissed the action pursuant to a motion to dismiss on the part of the defendants, saying that Bratenahl II was dispositive of the case and applied the doctrine of res judicata to support the motion to dismiss.

The motion to reconsider was filed and denied.

A motion to reconsider was filed with the Ohio State Supreme Court in the Bratenahl II decision, and this was denied.

A motion was filed in June of 1979 in the Ohio State Supreme Court to stay all proceedings, and that was denied.

Another motion to stay proceedings was filed in July in the Ohio State Supreme Court, and that was denied.

On or about June 26 of 1979 the Superintendent of Instructions of Ohio sent a letter to the two school systems of Bratenahl and Cleveland and instructed them to proceed with dispatch to merge the two school systems.

Bratenahl filed an appeal under Chapter 119 with the Common Pleas Court of Franklin County, and it was referred to Judge Thompson.

Judge Thompson dismissed the appeal on the ground that it was an appeal from a notice and not an order from the State School Board, and cited Judge Markus' reasoning in dismissing the action in the Stromberg case.

In July of 1979, John T. Corrigan, the County Prosecutor, sent a letter to the County Auditor and other affected County officials, in which he said that immediate compliance with the order of Bratenahl II should occur and to take steps to implement that order.

Six days thereafter a motion was filed in the Supreme Court of the State of Ohio by Bratenahl seeking relief after judgment pursuant to Rule 6(b) 4 and 5.

And with some dispatch and not in the Ohio State Supreme Court, but in the Cuyahoga County Common Pleas Court, a motion for a temporary restraining order was filed to restrain all proceedings until such time as the Ohio State Supreme Court could rule on the motion for relief after judgment pursuant to Rule 6(b) 4 and 5.

This motion for a temporary restraining order was granted ex parte, and the preliminary injunction was set to be heard on August 15th. This was dismissed for want of prosecution.

After Judge Markus had denied a motion for a rehearing in the Stromberg case, an appeal was taken to the Court of Appeals of Cuyahoga County, and on August 14 that Court not only dismissed the stay which had been attached to the appeal taken from his decision, but the case as well, and in that decision of the Court of Appeals of Cuyahoga County ruled 3311.29 of the Ohio Revised Code was a constitutionally valid statute.

August 14th an action was filed in this Court under the Civil Rights Act.

There are other steps:

On June 8, 1968, Bratenahl passed a resolution requesting that the State Board grant it a two-year exception from the 12 grade requirement of 3311.29 of the Ohio Revised Code, whereupon, effective July 1, 1970, the Bratenahl Local School District would be dissolved and its territory joined with the Cleveland City School District.

On June 10, 1968, the State Board granted the request, specifically resolving that the district would be dissolved on the date indicated by Bratenahl in its request. No appeal was taken from this resolution.

On January 28, 1970, Bratenahl, by resolution, requested a further postponement of the dissolution.

On February 9, 1970, without notice or a hearing, the State Board denied Bratenahl's request.

On August 24, 1973, the Court of Common Pleas of Franklin County entered a judgment vacating the order of the State Board denying Bratenahl's request for an extended exception.

On August 30, 1973, the same Court of Common Pleas entered a declaratory judgment expressly finding Bratenahl to be a legally existing school district until the State Board had a Chapter 119 hearing on its request for an extension.

On November 15, 1973, the 119 hearing was held before a referee.

On October 15, 1974, the State Board adopted the Referee's findings and issued an order dissolving the Bratenahl School District because it did not have 12 grades as required by 3311.29 of the Ohio Revised Code on July 1, 1968 or on July 1, 1970, the date the original exception expired.

From these facts Bratenahl argues:

(1) It has legal existence because the Common Pleas Court so declared in 1973 and that judgment was not appealed;

(2) That the 119 hearing in November of 1973 was unconstitutional because it was not allowed to cross-examine witnesses;

(3) That the October 1974 decision of the Board was arbitrary and capricious because it was based upon the State Board's desire to retaliate against Bratenahl for taking it to court;

(4) That the February 9, 1970 decision of the State Board is unconstitutional because Bratenahl did not have notice and an opportunity to be heard.

In Bratenahl II the Ohio Supreme Court held that because the district was dissolved in 1970, subsequent events are moot.

On history this case has been in the Court of Common Pleas of Franklin County, and twice in the Court of Ap-

peals in Franklin County, and twice in the Ohio State Supreme Court, and once in the United States Supreme Court, and twice in the Cuyahoga County Common Pleas Court, and once in the Court of Appeals of Cuyahoga County; notwithstanding other administrative hearings.

The defendants make some persuasive arguments:

Does Bratenahl have standing since the Ohio State Supreme Court in Bratenahl I and Bratenahl II found it was dissolved effective July 1, 1978?

Does it have standing to bring this action in this Court? That is an interesting argument.

They make another argument: Can the Civil Rights Act be substituted on appeal?

Our courts, the Sixth Circuit in particular, have dealt with these matters.

In the Ohio Transport vs. Public Utilities Commission of Ohio it states:

"The Supreme Court of the United States adhered to the rule that a judgment upon the merit in one suit is res judicata in another suit where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end."

The Court applies res judicata to the following claims:

(1) That the August 1973 decision of the Franklin County Common Pleas Court is a final judgment in full force and effect, and that the consequent October 1974, "119" hearing was unconstitutional, mooted by Bratenahl II.

(2) That the State Board deprived the Bratenahl District of its real and personal property without due process, and that the denial of Bratenahl's funding has also been undertaken without due process of law.

(3) That the dissolution of the Bratenahl District was undertaken arbitrarily and to retaliate against Bratenahl for being "too good" and for challenging the State Board in court. Judge Krenzler held that Section 3311.29, Ohio Revised Code, it not arbitrary and that it serves a State interest and is constitutional.

(4) That the plaintiffs were deprived of due process because the State Board has not applied the September 30, 1975, amendment of Section 3311.29, Ohio Revised Code, to the Bratenahl District; mooted by the 1970 dissolution.

(5) That the refusal of the State Board to accredit Bratenahl Schools is unconstitutional; mooted by Bratenahl I and II because there is no need to accredit a school system which does not exist.

(6) That the plaintiffs will be deprived of a sound education by their transfer to an allegedly inferior and unsafe system; mooted because this claim was made by Bratenahl in its 1970 application for a continued exception which the Ohio Courts held was properly denied.

(7) That dissolution of the District without a taxpayer referendum is unconstitutional, unpersuasive because county ordinance authorizing a referendum is not applicable. The State Courts held Section 3311 was properly applied and that section gives no right to a referendum.

All the issues except the conspiracy issue are dismissed on the defendant's motion to dismiss.

Under the doctrine of res judicata and collateral estoppel, res judicata deals with causes of action, and collateral estoppel deals with issues.

Finally, on the conspiracy charge further brought in this Court; Professor Ruben indicated that the movant in a motion in a summary judgment sustains a duty, has the burden of sustaining its position; that there is no justiciable issue; and I thought I heard him say, but I am going to decide that he didn't, that the party against which the move is made need do nothing to establish a justiciable issue.

Let me read Rule 56. This is the rule which we apply and by which we are governed when a motion for summary judgment is made and supported.

As provided in this rule, "An adverse party,"—that is the party against which the movant proceeds—"may not rest upon the mere allegations or denials of his pleading, but, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." That is the rule by which we are governed.

Does the allegation by plaintiffs of a conspiracy on the part of defendants to merge the Bratenahl Schools with the Cleveland City Schools as a part of a greater segregation conspiracy state a claim upon which relief can be granted?

Paragraph 17 (page 8), 71 (page 22), 72 (page 22), and 75 (page 23 and 24) of Plaintiff's Amended Complaint outline the purported conspiracy by State defendants and the Cleveland City Schools.

Plaintiffs allege that the defendants entered into a conspiracy to (A) deprive individual plaintiffs of their rights to a diverse racially integrated environment; (B) foster and enlarge the scope of the Cleveland City School Districts intentionally racially segregated school system and to subject individual minor plaintiffs to racial segregation; (C) to deprive plaintiffs of their right not to be classified or discriminated against on the basis of their

race, and instead subjecting the individual minor plaintiffs herein to classification or discrimination on the basis of race.

The plaintiffs relied upon the cases of Milliken v. Bradley and Gomillion v. Lightfoot to buttress the argument that they have presented a constitutional claim for which relief may be granted.

In Gomillion, black voters posed a Fifteenth Amendment charge to State legislation which gerrymandered out of existence their right to vote within the City of Tuskegee, Alabama.

In finding that the Fifteenth Amendment superceded their right of a state to control the electoral boundaries, the Court did not abandon its stance in Hunter v. City of Pittsburgh, in which the Court held that the states do have plenary power in certain circumstances to control the boundaries of municipalities or entities that are an arm of the state government.

Gomillion stands for the proposition that the strictures of the United States Constitution take precedent over the plenary power of the states to control the municipalities under their jurisdiction.

Using Gomillion, the plaintiffs assert that the State, acting through the State Board of Education, abrogated the constitutional rights of the students of Bratenahl under the Fourteenth Amendment when it ordered the merger of the Bratenahl and the Cleveland schools. The rights which plaintiffs assert, however, are not rights which are accorded protection under the Fourteenth Amendment.

The Supreme Court stated in San Antonio v. Rodriguez, that education is not a fundamental right under the Constitution which would require a standard of strict judicial scrutiny in reviewing State action affecting this interest. Nothing in the Constitution deals with the right to an education.

Further, the Court found that there is no absolute right to be educated in an integrated atmosphere. Absent a showing of intentional segregation which results in a dual school system, a cause of action under the Constitution will not lie.

Students do have the right not to be discriminated against because of race. Discriminatory acts which give rise to de jure segregation are acts prohibited by the Fourteenth Amendment. No question about that.

The mere fact of segregation, without affirmative State action that fosters or promotes segregation, does not give rise to a Fourteenth Amendment entitlement to an integrated education.

Counsel has pointed out that the Court in the Sixth Circuit has remanded to Judge Battisti the condition and situation with respect to the State Board of Education in the charges lodged in his court, and that matter has not as yet been disposed of.

De facto segregation does not give rise to an affirmative right of a student to an integrated education, nor does it impose an affirmative duty upon a school system to desegregate.

For the foregoing reasons, the plaintiff's asserted claim that the defendants conspired to deny them a diverse racially integrated educational environment does not give rise to a claim upon which relief can be granted.

Furthermore, this entitlement that plaintiffs assert will be fulfilled in the merger of Cleveland and Bratenahl, because Cleveland is under another order of this District Court to desegregate its schools.

The plaintiffs claim that the defendants conspired to merge Bratenahl with Cleveland in order to create a smokescreen of good faith compliance with the Constitution of the United States, which would cloud or obscure

their true intent of keeping the races within the Cleveland Public Schools separate and unequal.

This argument is specious. The State of Ohio under the constitutionally valid statute, Ohio Revised Code, Section 3311.29, has the duty to merge school systems if they do not comply with minimal State requirements pursuant to State statute.

When it signed the unappealed decree to merge in 1968, Bratenahl was not in compliance with State statute, and the State had a duty to order merger.

The plaintiff's reliance upon Milliken v. Bradley is misplaced. In Milliken, the Supreme Court said that the scope of a remedy in a desegregation case may not exceed the scope of the liability.

In that case, while the Detroit City Schools alone were found guilty of segregation, the remedy of the District Judge included for purposes of a desegregation remedy other school districts that had sustained no liability under the original finding of intentional segregation.

In announcing that school boundaries could not be set aside wilfully, the Supreme Court said, "Before separate and autonomous school districts can be set aside by consolidating the separate units for remedial purposes or by imposing a remedy, it must be shown that there has been a constitutional violation in one district that produces a significant segregative effective in another district."

In the case before this Court the merger was not for remedial purposes. It was based upon 3311.29, a self-effectuating act of the Ohio Legislature, which the State Board of Education had the authority and duty to enforce.

Furthermere, as of 1970 the Bratenahl School District was not an autonomous entity whose autonomy would be entitled to protection under Milliken. The merger was agreed to by Bratenahl in 1968, effective July 1, 1970.

The defendants have moved in the alternative for summary judgment with respect to their alleged conspiracy to foster racial segregation by absorbing Bratenahl into the Cleveland schools.

It is undisputed that the Bratenahl School District would have been dissolved by operation of law under 3311.29 on July 1, 1968, but for the State Board of Education's intervention granting a two-year reprieve from this legislative mandate.

It is also undisputed that the State Board is authorized to grant such relief only "where topography, sparcity of population, and other factors make compliance with 3311.29 impracticable."

In this case it is abundantly clear that the State Board granted a two-year reprieve to the Bratenahl School Board in order to facilitate a smooth merger with the Cleveland schools.

The reprieve was conditioned upon Bratenahl's agreement to take measures to integrate its almost exclusively white school system, and Bratenahl did.

These facts in the mind of the Court belie the plaintiff's allegation that the defendants conspired to place their children in a segregated school system, and the plaintiff's exhibits, the letters and affidavits, fail to present a genuine issue of material fact regarding the purported existence of a conspiracy to place their children in segregated schools.

All the material facts in this case point to the opposite conclusion. The defendant's alternative motion for summary judgment is accordingly granted with respect to the allegation that they conspired to subject plaintiffs to a segregated school system.

So ordered.

We stand recessed.

[5] DECLARATORY JUDGMENT COMPLAINT

(Filed November 29, 1971)

Case No. 247,705

IN THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO
COLUMBUS, OHIO

BOARD OF EDUCATION
BRATENAHL LOCAL SCHOOL DISTRICT
Plaintiff,

vs.

STATE BOARD OF EDUCATION OF OHIO
MARTIN ESSEX, Superintendent of Public Instruction
DEPARTMENT OF EDUCATION OF OHIO
Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

This Declaratory Judgment action is brought pursuant to Rule 57 O.R.C.P., R.C. 2721.06 and R.C. 2721.02.

1. Plaintiff Board of Education of the Bratenahl Local School District is a duly elected and constituted body politic and corporate and, as such, is authorized and required to maintain public schools within that district. (See R.C. 3313.17)

2. Defendant State Board of Education of Ohio is the duly elected and constituted authority for the general supervision of the system of public education in the State of Ohio. (See R.C. 3301.07)

3. Defendant Martin Essex is the duly appointed and serving Superintendent of Public Instruction, having been so appointed by the State Board of Education. His duties as Superintendent of Public Instruction are prescribed by law, including, but not limited to, R.C. 3301.12.

4. Defendant Department of Education is the duly created and existing administrative unit and organization through which the policies, directives and powers of the State Board of Education and the duties of the Superintendent of Public Instruction are administered by such Superintendent, as executive officer of the Board. (See R.C. 3301.13)

5. A controversy exists because of the refusal of all Defendants to:

a. Recognize the rights, status and other legal relations of Plaintiff Bratenahl Local School District to operate as a duly constituted public school district, maintaining, within its district, grades kindergarten through twelve, inclusive; and

b. Provide technical and professional assistance and advice to Plaintiff school district in relation to the aspects of education relative to the maintenance of a four-year high school within that district, and particularly with respect to matters of administration, curriculum and instruction and the interpretation of school laws and state regulations, all as required under R.C. 3301.12.

6. Such controversy relates particularly to the interpretation of R.C. 3311.29, a section of the Revised Code of Ohio which, to date, has never been authoritatively interpreted by a court of record.

7. It is the belief and contention of Plaintiff School District that regardless of whatever legal effect R.C. 3311.29 may have upon any Ohio public school district which does not maintain within its district public schools consisting of at least grades one through twelve, inclusive; that section has no application to Plaintiff School District which does maintain within its district, as all Defendants have been informed, public schools consisting of grades kindergarten through twelve, inclusive.

WHEREFORE, Plaintiff Bratenahl Local School District prays that this Court determine, declare and decide the present rights and status of Plaintiff School District under R.C. 3311.29, and as a part thereof that this Court specifically declare and decide; now that Plaintiff School District does maintain within its district grades kindergarten through twelve, inclusive; that:

1. Plaintiff School District is not subject to the provisions of R.C. 3311.29; and

2. Defendant Martin Essex, as Superintendent of Public Instruction, and Defendant Department of Education of Ohio are authorized and required under R.C. 3301.12 and 3301.13 to provide technical and professional assistance and advice to Plaintiff School District in reference to all aspects of its educational program and that Plaintiff have such other relief as the Court may deem proper.

Further, pursuant to Rule 57 O.R.C.P., the Court is respectfully requested to advance this Complaint for Declaratory Judgment on the trial list, for trial on a date certain to be determined by the Court.

CHESTER, HOFFMAN, PARK, WILCOX & ROSE
By: CHARLES S. LOPEMAN

ARTER & HADDEN
By: WILLIAM S. BURTON
Attorneys for Plaintiff,
Board of Education
Bratenahl Local School District

[6] TRIAL COURT APRIL 29, 1972, DECISION DISMISSING DECLARATORY JUDGMENT ACTION

Case No. 247,705

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Plaintiff,

vs.

STATE BOARD OF EDUCATION OF OHIO, MARTIN ESSEX, Superintendent of Public Instruction, DEPARTMENT OF EDUCATION OF OHIO,
Defendants.

DECISION

Rendered this 29th day of April, 1972.

MARSHALL, *J.*

On April 3, 1972 this branch of the Court in Case 239,508 made a decision on the appellees' motion, filed November 26, 1971, and dismissed the appeal in that case as being moot. We, accordingly sustained appellees' motion to dismiss the appeal. In that decision we made several findings. For example, we found that the Board of Education of Bratenahl Local School District passed a Resolution on June 8, 1968 in which it resolved to cease to exist and its territory be joined and made a part of the Cleveland City School District, effective July 1, 1970. This was in contemplation of Section 3311.29, R.C. which provided that on July 1, 1968 no school district shall exist which does not maintain public schools consisting of

grades one through twelve, unless the State Board by Resolution, granted an exception of two years.

The exception of two years was approved by the State Board. Within said two-year exception period, and prior to the July 1, 1970 termination date, the Appellant school board applied for an additional extension of 15 months but this was denied by the State Board. But for the restraining order of Judge Wright on June 14, 1971, in Case 239,508, the Bratenahl Local School District would have been terminated on July 1, 1970, under the provisions of Section 3311.29, R.C. and according to Appellants Resolution of June 8, 1968.

The instant case was filed on November 29, 1971, seeking Declaratory Judgment. It was first assigned to Judge Rader. On December 27, 1971 defendants filed their Motion to Dismiss the Complaint. Before any ruling was made thereon the instant case was transferred to this branch of the Court for trial or other disposition, under our Rule 27.01.

Defendants filed their Motion to Dismiss the Complaint in the instant case on December 27, 1971, asserting that said Complaint failed to state a claim upon which relief could be granted.

Section 3311.29, R.C. is clear and unambiguous. It applied to the Bratenahl Local School District which on the crucial date of July 1, 1968 did not maintain grades one through twelve. It did not even qualify during the two year period of extension, expiring July 1, 1970, the date the Bratenahl Board by resolution recognized as the date it would "cease to exist and its territory will be joined with and made a part of the Cleveland City School District."

The Complaint does not state facts which would warrant the continuance of the Bratenahl Local School District beyond July 1, 1970. The claim of conditions existing today does not put new life into a district which ceased to exist as of July 1, 1970. We repeat what we said once before, that it was the legislature which determined that, as of July 1, 1968, school districts which did not meet the prescribed requirements would not exist. See Section 3311.29, R.C.

For the sake of brevity and convenience we hereby repeat by reference our decision made on April 3, 1972, in Case 239,508 as though set forth in full herein.

Although the proceedings in these two cases are different in form the parties are the same and both proceedings arise from the same controversy and involve the same basic facts. Our rulings in these two cases should terminate the controversies which have arisen and persisted between the parties, and allow the early transfer of the dissolved Bratenahl Local School District, as provided by law.

The Complaint is hereby dismissed. The parties are hereby released from restraining orders made in either case 239,508 or in this case, which are hereby terminated.

GEORGE B. MARSHALL, *Judge*

[7] COURT OF APPEALS JANUARY 9, 1973, DECISION REVERSING TRIAL COURT DISMISSAL OF DECLARATORY JUDGMENT ACTION

No. 72AP-269 and No. 72AP-270

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION BRATENAHL
LOCAL SCHOOL DISTRICT,
Plaintiff-Appellant,

v.

STATE BOARD OF EDUCATION OF OHIO,
MARTIN ESSEX, Superintendent of Public Instruction
DEPARTMENT OF EDUCATION OF OHIO,
Defendants-Appellees.

DECISION
Rendered on January 9, 1973

PER CURIAM.

These appeals, consolidated by prior order of this court, are from judgments of the Franklin County Court of Common Pleas dismissing both actions upon the grounds that the issues are moot. Case No. 72AP-270 involves an appeal to the trial court from an order of the State Board of Education and case No. 72AP-269 involves an action for declaratory judgment involving similar issues. For simplicity the parties will hereafter be referred to as Bratenahl and State Board respectively.

R. C. 3311.29 was amended effective December 1, 1967, to provide that after July 1, 1968, no school district should exist which did not maintain within the district public schools consisting of grades 1 through 12, but authorized the State Board to permit exceptions under specified conditions. At that time Bratenahl did not maintain a high school within the district and could not do so because of State Board requirements that a high school must have a minimum of 240 students. By resolution of the State Board adopted June 10, 1968, Bratenahl was granted a 2-year exception from the provisions of R. C. 3311.29, after which Bratenahl was to be merged with the Cleveland City School District.

Thereafter the State Board modified the requirements for high schools and eliminated the 240-minimum-student requirement substituting other requirements therefor so that it was possible for Bratenahl to establish a high school within the district under the new State Board standards. Bratenahl then proceeded with the making of a feasibility study and plans for a high school to serve the Bratenahl district. Bratenahl then applied to the State Board for a further exception to R. C. 3311.29 for a period of 15 months and for authorization to establish a high school effective in September 1971. The State Board denied this request on February 9, 1970. Bratenahl appealed this order to the trial court pursuant to R. C. 119.12.

The trial court, upon motion of the State Board, dismissed the appeal upon the grounds that the order of February 9, 1970, was not a final appealable order. Bratenahl thereupon appealed to this court in case No. 9815. This court, by entry of June 10, 1970, granted a stay of execution to Bratenahl. On May 27, 1971, this court rendered judgment reversing the dismissal by the trial court and remanding the case to that court for further proceedings

in accordance with the decision rendered therein on April 27, 1971. The State Board appealed to the Supreme Court which, on August 23, 1971, overruled a motion of the State Board for a restraining order and, on October 5, 1971, overruled the State Board's motion to certify. On June 14, 1971, the trial court, acting pursuant to the mandate of this court, in case No. 9815, suspended any order of the State Board "which would terminate the existence of the Bratenahl School District."

Thereafter, on November 29, 1971, Bratenahl filed its complaint for declaratory judgment which is the subject of the appeal in case No. 72AP-269. On November 26, 1971, the State Board filed a motion to dismiss the appeal pending in the trial court upon the grounds that the issue had become moot. On December 27, 1971, the State Board filed a motion to dismiss the complaint in the declaratory judgment action. In support of such motions, the State Board raised essentially the same arguments that it had raised in this court on appeal in case No. 9815 except the argument that R. C. 119.12 does not apply to the State Board, substituting the contention that these facts rendered the appeal moot rather than that there was no final appealable order.

On August 14, 1972, the trial court entered judgment in both cases sustaining both motions to dismiss for the reasons stated in a decision rendered April 3, 1972, in the appeal case and April 29, 1972, in the declaratory judgment action.

Bratenahl appealed the judgments to this court and, on September 6, 1972, this court granted a further stay order. Bratenahl raises three assignments of error as follows:

> "1. In dismissing the administrative appeal originally filed by this Appellant February 20, 1970 (Common Pleas Case No. 239,508);

> "2. In dismissing the declaratory judgment action filed by this Appellant November 29, 1971, (Common Pleas Case No. 247,705);
>
> "3. In interpreting R. C. 3311.29; in determining the legal effect of certain orders of the State Board of Education, and the effect thereof upon the rights, duties, privileges, benefits, legal relationships and legal existence of this Appellant; and in determining whether the judgments of the trial court are consistent with the judgment of the Court of Appeals of Franklin County entered May 27, 1971 in Case No. 9815, upon a prior appeal in this same case, based upon an unreported decision rendered by this Court April 27, 1971."

Broken down into simplest terms, the contentions of the State Board that these actions are moot are predicated upon (1) a contention that R. C. 3311.29 is self-executing to the extent that Bratenahl no longer exists and (2) the 2-year exception granted by the State Board order June 10, 1968, has expired as of July 1, 1970 and therefore Bratenahl has ceased to exist. Essentially the same arguments were made to this court in the prior appeal and rejected by this court, although at that time the State Board contended that this was a basis for there being no final appealable order. Furthermore, a comparison of the decisions rendered by the trial court in first dismissing the appeal on the grounds that there was no final appealable order and then dismissing the appeal upon the grounds that it is moot after reversal by this court, indicate that the two decisions are predicated upon the same reasoning; the only difference being that the date of July 1, 1970, has come and gone in the interim.

Both the State Board's arguments and the trial court's decision fail to take cognizance of the effect of the stay of executions granted by this court and by the trial court pursuant to the mandate of this court. One of the errors

assigned to this court upon the prior appeal in case No. 9815 was the denial of such a stay and this court reversed the entire judgment, including the denial of that stay.

In the decision rendered June 6, 1972, in *State, ex rel. Drumm, v. Civil Service Commission*, unreported case No. 72AP-41, this court stated that:

> "An action may become moot when an occurrence during the pendency of the action renders it impossible to render any effective judgment leaving only purely academic or abstract questions. Under such circumstances, an appeal or an action must be dismissed because no effective judgment can be rendered by the court. An action does not ordinarily become moot, however, merely because of the passage of time but rather some occurrence must intervene which renders it impossible to render an effective judgment."

The State Board's contention that these actions are moot is predicated upon the mere passage of time. The only occurrences in the interim are the granting of the stay orders by this court and the trial court, the judgments rendered by this court in case No. 9815 upon the prior appeal, and the orders of the Supreme Court upon the appeal to that court, and the establishment by Bratenahl of a high school, apparently without State Board approval. None of these intervening occurrences render these actions moot, but rather all of them tend to indicate the continued existence of the legal issues involved and the necessity of their judicial resolution.

R. C. 3311.29 is not self-executing. This is clearly indicated by the provisions thereof for exceptions being granted by the State Board and the requirements of orders or voluntary agreements. It is further indicated by the last paragraph thereof which provides that:

> "The superintendent of public instruction is without authority to distribute funds under sections 3317.02 and 3317.06 of the Revised Code to any school district which after July 1, 1968, does not maintain schools with grades one through twelve, inclusive, and to which no exception has been granted by the state board of education."

Obviously, that section recognizes that school districts may, contrary to this section, in fact continue to exist after July 1, 1968, which do not maintain a high school and to which no exception has been granted by the State Board. If R. C. 3311.29 were self-executing this paragraph would be meaningless and pure surplusage.

Furthermore, Bratenahl in fact does exist and is operating as a school district and, at present, maintains schools with grades 1 through 12 inclusive, but without State Board sanction, and even though the exception granted by the State Board has expired. These cases involve, *inter alia,* the determination of the legal effect of such continued existence, as well as a determination of whether the State Board should have granted a further exception to Bratenahl to permit it to establish the high school which it now maintains.

The trial court in dismissing the appeal as moot acted inconsistently with the mandate of this court upon the prior appeal in case No. 9815. The mandate of this court was to pursue further proceedings consistent with the opinion rendered April 27, 1971. In that decision this court stated that "* * * the effect of the February 9, 1970 order of appellees is to put the appellant out of existence * * *." This court further stated that "The order of appellee denying approval of appellant's proposed high school program and denying appellant's request for an extension for an additional fifteen months to the exception granted by appellee, has the effect of a determination of the 'rights, duties, privileges, benefits, or legal relation-

ships of appellant." That mandate contemplated a determination of the appeal upon its merits.

Apparently, however, the mandate of this court was not sufficiently clear to the trial court. Accordingly, we will attempt to be more explicit herein. In its notice of appeal to the trial court, Bratenahl stated that the grounds of the appeal from the State Board were that "appellant was not afforded a complete and fair hearing on the merits; that said resolution and order was not supported by reliable, substantial and probative evidence; was arbitrary, capricious, unlawful, and against the manifest weight of the evidence; was against public policy; and deprived appellant of a substantive right without due process of law." Bratenahl contends that it was not afforded a proper hearing in accordance with R. C. 119.06 to 119.10.

The hearing upon appeal to the trial court is controlled by R. C. 119.12. The appeal shall be heard upon the record as certified by the State Board and such additional evidence as "is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before" the State Board if a request for the admission of such evidence is made and granted by the trial court. The determination of the trial court must be predicated upon the record and such additional evidence, if any, as the trial court admits, and must be whether the order of the State Board "is supported by reliable, probative and substantial evidence and is in accordance with law." If no proper hearing was held so that there is no evidence in the record, then the order would not be so supported and remand for a proper hearing might be required. See *Arcaro Bros. Builders, Inc., v. Zoning Board of Appeals* (1966), 7 Ohio St. 2d 32.

It is unfortunate that this litigation has been so prolonged and a determination of the merits so long delayed.

However, this has not resulted from a lack of diligence by Bratenahl in prosecuting the matter.

Rather, it has resulted from the persistence of the State Board in its efforts to avoid determination upon the merits of the appeal by the repeated motions to dismiss which, although the State Board had a complete right to make them, have resulted in the prolonged delay.

For the foregoing reasons, the judgments of the Franklin County Court of Common Pleas are reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this decision.

Judgment reversed and remanded.

HOLMES, WHITESIDE and REILLY, JJ., concur.

[8] SUPREME COURT APRIL 20, 1973 DENIAL OF REVIEW OF REINSTATEMENT OF DECLARATORY JUDGMENT ACTION

No. 73-206

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO,
CITY OF COLUMBUS.

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee,

vs.

STATE BOARD OF EDUCATION *et al.*,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

[9] TRIAL COURT AUGUST 8, 1973 DECISION GRANTING SUMMARY JUDGMENT IN DECLARATORY JUDGMENT ACTION

Case No. 247,705

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Appellant,

vs.

STATE BOARD OF EDUCATION, *et al.*,
Appellee,

DECISION

Rendered this 8th day of August, 1973.

SHOEMAKER, *J.*

This matter comes before the Court on Plaintiff Bratenahl's motion for summary judgment in this declaratory judgment action. Upon consideration of the record in this case, the Court finds that there is no genuine issue as to any material fact and that Bratenahl, the moving party, is entitled to judgment as a matter of law. The Franklin County Court of Appeals, in its Decision in this case rendered on January 9, 1973, held that R. C. Section 3311.29 is not self-executing, and Bratenahl Local School District does legally exist. Bratenahl Local School District is therefore entitled to technical and professional assistance under R. C. Section 3301.12 and R. C. Section 3301.13.

Plaintiff Bratenahl's motion for summary judgment is SUSTAINED. Counsel for Plaintiff may prepare an Entry consistent with this decision.

/s/ FRED J. SHOEMAKER, *Judge*

[10] TRIAL COURT AUGUST 30, 1973, JUDGMENT IN DECLARATORY JUDGMENT ACTION

Case No. 247,705

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Plaintiff,

vs.

STATE BOARD OF EDUCATION OF OHIO, *et al.*,
Defendants.

JUDGMENT ENTRY

This cause came on to be heard on the motion of plaintiff, Bratenahl Local School District, for summary judgment. The Court having considered said motion and the record herein finds as follows:

1. The Franklin County Court of Appeals, in a decision rendered January 9, 1973, held that Revised Code Section 3311.29 is not self-executing.
2. The Franklin County Common Pleas Court, in a companion case, No. 239,508, involving these same parties, has held that the State Board of Education did not hold a proper Chapter 119 hearing when it denied, on February 9, 1970, the request of the Bratenahl Local School District for postponement of the dissolution of the school district under Revised Code 3311.29, and the February

9, 1970, resolution has been vacated by the Franklin County Common Pleas Court.

3. The Bratenahl Local School District legally exists and is entitled to technical and professional assistance from the defendants under Revised Code Sections 3301.12 and 3301.13.
4. Nothing in the Decision of this Court of August 8, 1973, or in this Judgment Entry shall prevent the State Board of Education from holding a proper Chapter 119 hearing with regard to the issue of whether an exception should be granted by the State Board of Education under Revised Code Section 3311.29 to the Bratenahl Local School District.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. There is no genuine issue as to any material fact and the plaintiff is entitled to summary judgment on the issue of whether Revised Code 3311.29 is self-executing, the Franklin County Court of Appeals having held in a decision rendered January 9, 1973, that said statute is not self-executing.
2. The plaintiff is entitled to a Chapter 119 hearing on the question of whether an exception should be granted by the State Board of Education under Revised Code Section 3311.29 to the Bratenahl Local School District.
3. The Bratenahl Local School District legally exists and is entitled to technical and professional assistance under Revised Code Section 3301.12 and 3301.13 in the absence of an order of the State Board of Education rendered pursuant to a Chapter 119 hearing on the question of whether an

exception should be granted by the State Board of Education under Revised Code Section 3311.29 to the Bratenahl Local School District.

/s/ FRED J. SHOEMAKER, *Judge*

[11] COURT OF APPEALS DECEMBER 16, 1976 DECISION REVERSING TRIAL COURT

No. 76AP-67

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Appellant-Appellant,

v.

STATE BOARD OF EDUCATION OF OHIO, DEPARTMENT OF EDUCATION OF OHIO,
and
MARTIN W. ESSEX, SECRETARY, STATE BOARD OF EDUCATION OF OHIO,
Appellees-Appellees.

DECISION

Rendered on December 16, 1976

WHITESIDE, *J.*

Appellant, Board of Education, Bratenahl Local School District, hereinafter referred to as "Bratenahl," appeals from a judgment of the Franklin County Court of

Common Pleas affirming an order of the State Board of Education, hereinafter referred to as "State Board," ordering dissolution of Bratenahl pursuant to R. C. 3311.29. In support of its appeal, Bratenahl has raised four assignments of error as follows:

> "The Court of Common Pleas, in its December 30, 1975, judgment in this cause:
>
> "1. Erred in denying the Bratenahl Request For the Admission of Additional Evidence (under R. C. 119.12).
>
> "2. Erred in denying the Bratenahl Motion to Invalidate State Board of Education Order As a Matter of Law, pursuant to R. C. 119.07.
>
> "3. Erred in its statutory construction of R. C. 3311.29.
>
> "4. Erred in its separate findings that the October 14, 1974, State Board of Education dissolution order was supported by reliable, probative and substantial evidence and was in accordance with law."

R. C. 3311.29 was amended in 1967 to require that every school district "maintain within such district public schools consisting of grades one through twelve," and that, after July 1, 1968, any district not so maintaining public schools consisting of such grades would be dissolved unless granted an exception by the State Board in accordance with that section. At that time, Bratenahl did not maintain a high school within the district but, instead, paid tuition for students of the district to attend high school in other districts. Prior to July 1, 1968, Bratenahl could not have maintained a high school inasmuch as a minimum of 240 students were required by state standards, more students than Bratenahl had in all twelve grades. By an order of June 10, 1968, the State Board granted Bratenahl a two-year exception from R. C. 3311.29. Subsequent to this order, new minimum standards previously adopted

by the State Board became effective on July 1, 1968, eliminating the requirement of a minimum of 240 students so that Bratenahl theoretically after July 1, 1968, and during the period of the extension, could comply with R. C. 3311.29 and maintain grades one through twelve within the district.

When Bratenahl became aware of the new minimum standards sometime after they took effect, Bratenahl commenced efforts to establish a high school within the district. Bratenahl retained Stanton & Leggett & Associates to conduct a feasibility study and to develop plans for a Bratenahl high school. In December, 1969, Bratenahl requested the State Board for a further exception from the application of R. C. 3311.29 in order to establish a high school and made a formal request for such relief in January, 1970. On February 9, 1970, without affording Bratenahl a hearing, the State Board denied Bratenahl's request. Bratenahl, pursuant to R. C. 119.12, appealed this order to the Court of Common Pleas. That court dismissed the appeal upon the grounds that the State Board's order was not a final appealable order. This court upon appeal found the order to constitute a final appealable order and remanded the cause to the Common Pleas Court pursuant to the unreported decision in *Bd. of Education of Bratenahl Local School District v. State Bd. of Education*, No. 9815, Court of Appeals of Franklin County, April 27, 1971 (1971 Decisions, page 694). The Supreme Court on October 5, 1971, denied the State Board's motion to certify.

During the pendency of that appeal in the Court of Common Pleas upon remand from this court, Bratenahl, on November 29, 1971, filed an action for declaratory judgment. The Court of Common Pleas on August 14, 1972, dismissed both the appeal and declaratory judgment actions. By unreported decision in the case of *Bd. of Education of Bratenahl Local School District v. State Bd. of*

Education, Nos. 72AP-269 & 72AP-270, Court of Appeals of Franklin County, January 9, 1973 (1973 Decisions, page 34), this court reversed the dismissal of both the appeal and declaratory judgment actions and again remanded to the Court of Common Pleas.

Upon remand of the appeal action, the Court of Common Pleas, by judgment entry entered on August 24, 1973, vacated the February 9, 1970, order of the State Board denying Bratenahl an exception from the operation of R. C. 3311.29 for the purpose of establishing a high school. The Court of Common Pleas did not remand that proceedings to the State Board for further action, nor did the Court of Common Pleas expressly grant the requested relief to Bratenahl, stating that the action of the State Board was taken without a proper R. C. Chapter 119 hearing. A few days later on August 30, 1973, the Court of Common Pleas entered a declaratory judgment expressly finding that Bratenahl is a legally existing school district and is entitled to an R. C. Chapter 119 hearing on the question of whether it is entitled to an exception pursuant to R. C. 3311.29. Although the phraseology of the judgment is not entirely explicit, the effect of that declaratory judgment is that Bratenahl is a legally constituted school district and will continue to be such unless and until a dissolution order be entered pursuant to R. C. 3311.29 or otherwise. Such conclusion is of course predicated in part upon the prior determination by this court that R. C. 3311.-29 is not self-executing but requires action by the State Board for implementation.

Thereafter, the present proceedings were instituted to fulfill the State Board's desire to dissolve Bratenahl pursuant to R. C. 3311.29 by resolution of September 10, 1973, indicating the Board's preliminary determination to dissolve Bratenahl and that Bratenahl is not entitled

to an exception pursuant to R. C. 3311.29. Pursuant to request of Bratenahl, an R. C. Chapter 119 hearing was held before a referee on November 15, 19, and 20, 1973. On September 15, 1974, the referee made his report and recommendations to the State Board, making five findings of fact and five conclusions of law, as follows:

"FINDINGS OF FACT

"* * *

"(1) Bratenahl did not on July 1, 1968, maintain a school system consisting of grades 1 through 12.

"(2) Bratenahl on June 8, 1968, committed itself to merging with the Cleveland City School System as of July 1, 1970.

"(3) As of July 1, 1970, Bratenahl did not maintain a school system consisting of grades 1 through 12.

"(4) Since September of 1971 Bratenahl has operated a system consisting of elementary grades in conventional school facilities and grades 9 through 12 in two separately leased facilities (an abandoned Nike site for the school year 1971-1972 and in a Jewish temple (Teferith Israel Society) for the school year 1972-1973 and to date. This four-year program was not the subject of charter granted pursuant to Section 3301.16, Revised Code, although such charter has been applied for and the Cuyahoga County Board of Education has approved a course of study as required by Section 3313.60, Revised Code, as of November 7, 1973.

"(5) That the high school facility operated by Bratenahl as of the hearing did not meet the state minimum standards for high schools, and had it been chartered as of such date, revocation of such charter would have been dictated by operation of Section 3301.16, *supra*.

"(6) That the educational needs of the pupil population of Bratenahl would be best served by a merger with the Cleveland City School System because such merger would provide a more comprehensive program, better serve special needs and result in a more economical operation.

"CONCLUSIONS OF LAW

"(1) The provisions of Section 3311.29, *supra*, requiring the maintenance of grades 1 through 12 by a school district contemplate a *de jure* rather than a *de facto* maintenance. As a consequence, despite the fact that Bratenahl presently enjoys a legal existence as a school district, it is in violation of said section.

"(2) By reason of the conclusions reached in paragraph (1) above, the dissolution of Bratenahl is dictated by operation of the aforesaid statute.

"(3) There were no conditions of topography, sparsity of population or other factors as would have rendered the dissolution of Bratenahl and its consequent merger with the Cleveland City School District impracticable as of July 1, 1968, July 1, 1970, or as of the date of the hearing on November 15, 19, or 20, 1973.

"(4) By reason of the conclusions stated in paragraphs numbered (1) through (3) hereof, and as of any of the dates mentioned in paragraph (3), there was no legal or practical ground for granting Bratenahl an exception for the purpose of operating the high school facility which it now maintains without a charter lawfully issued pursuant to Section 3301.16.

"(5) That the findings, conclusions and recommendations expressed in this report may be modified or disapproved by the Board pursuant to Section 119.09, Revised Code."

Only the first and fourth findings of fact are both pertinent and fully supported by reliable, probative, and

substantial evidence. The second purported finding of fact is irrelevant to the issues herein, this court having held to this effect in both the 1971 and 1973 decisions of this court rendered upon the prior appeals involving the status of Bratenahl, which was clearly established by the judgment of the Common Pleas Court in the declaratory judgment action, declaring that Bratenahl has continued legal existence. Although the third finding of fact is technically correct, it is difficult to conceive of any relevance to the issue before us.

The fifth and sixth findings of fact present special problems in that they are in part supported by reliable, probative, and substantial evidence and in part not so supported. Insofar as the fifth finding of fact finds that the high school facility operated by Bratenahl did not, as of the date of hearing before the referee, meet the totality of the state minimum standards for high schools, there is reliable, probative, and substantial evidence to support such a finding. However, there is no such evidence to support a finding that a charter, had it been issued, would have been required to be revoked by operation of R. C. 3301.16, which in any event is more in the nature of a conclusion of law. As to the sixth finding of fact, there is some evidence to support a finding that merger with the Cleveland school district would provide a more comprehensive program and better serve special needs of high school students, but there is no such evidence with respect to elementary students, nor is there any evidence to support a finding that merger would result in a more economical operation. As to the conclusions of law, only the fifth conclusion of law is fully legally correct; however, it relates only to the power of the State Board to either approve, disapprove, or modify the findings and recommendations of the referee and does not relate to the merit issues.

Notwithstanding these deficiencies in the findings of fact and conclusions of law made by the referee, the State Board adopted such findings of fact and conclusions of law in toto as well as the recommendation of the referee that Bratenahl be dissolved and merged with the Cleveland school district pursuant to R. C. 3311.29. It is this order which is the subject of this appeal.

When one travels upon the wrong road, he usually arrives at the wrong destination. Unfortunately, the referee and the State Board traveled upon the wrong road with respect to the third conclusion of law, predicating the conclusion set forth in the fourth conclusion of law that there was no ground for granting Bratenahl an exception upon consideration of whether merger of Bratenahl with the Cleveland city school district was impracticable. R. C. 3311.29, however, predicates exceptions upon whether compliance with R. C. 3311.29 is impracticable; that is, whether it is impracticable for the district, Bratenahl in this case, to maintain public schools consisting of grades one through twelve inclusive. R. C. 3311.29 has since been amended so as to require maintenance of kindergarten through the twelfth grade and presently reads, as follows:

> "Except for a joint vocational school district, no school district shall be created and no school district shall exist which does not maintain within such district public schools consisting of grades kindergarten through twelve and any such existing school district not maintaining such schools shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily, which order shall provide an equitable division of the funds, property, and indebtedness of the dissolved school district among the districts receiving its territory. The state board of education

may authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable.

"The superintendent of public instruction is without authority to distribute funds under sections 3317.022 to 3317.025 of the Revised Code to any school district that does not maintain schools with grades kindergarten through twelve and to which no exception has been granted by the state board of education." (Note: with the exception of the change from grade one to kindergarten and the addition of the introductory clause "except for a joint vocational school district," this section has read the same at all times pertinent hereto.)

Although this issue has not been explicitly argued by Bratenahl, it is raised by the assignments of error and was specifically raised by Bratenahl before the referee. (Tr-49.) Accordingly, this court will proceed to consider this basic, important issue, which is one of the two fundamental issues upon which this litigation rests; the two issues being: (1) whether Bratenahl is presently in compliance with R. C. 3311.29, which we will discuss *infra;* and (2) if not, whether Bratenahl is entitled to an exception from the operation of R. C. 3311.29; that is, an exception from maintaining grades kindergarten through twelve.

R. C. 3311.29 requires each school district to maintain grades kindergarten through twelve, unless granted an exception by the State Board because "topography, sparsity of population, and other factors make compliance impracticable." Obviously, "compliance" means the maintaining of grades kindergarten through twelve. No issue is raised or presented by R. C. 3311.29 as to whether or not merger is impracticable; rather, the issue is whether compliance with the mandate of R. C. 3311.29 is impracticable, that mandate being the maintenance of grades kindergarten through twelve by each school district.

The topographical features of Bratenahl are somewhat unique in that it is a long strip-like district, being much longer than wide, bounded on one wide side by Lake Erie and on the other by a freeway. However, the topographical features would not in and of themselves make compliance with R. C. 3311.29 impracticable.

However, the evidence is quite overwhelming that there is a sparsity of population problem with respect to Bratenahl and has been at all times pertinent to this case. Population, of course, refers to student population, rather than total population, since it is only student population which is pertinent to the practicability of maintaining grades kindergarten through twelve.

The elementary school enrollment of Bratenahl during the 1968-1969 through the 1973-1974 school years has varied from 167 to 183, and was 174 at the time of the hearing before the referee. (Agency Exhibit 26.) Even a portion of these students were tuition students from another school district, admitted to Bratenahl on a tuition basis for the purpose of implementing an integration program. The high school enrollment was somewhat lower. For the 1972-1973 school year, the total high school enrollment was 72, consisting of 25 in the ninth grade, 14 in the tenth grade, 9 in the eleventh grade, and 25 in the twelfth grade. (Agency Exhibit 12.) For the 1973-1974 school year, at least as of October 5, 1973, the enrollment had dropped to 57 in the Bratenahl high school, consisting of 22 in the ninth grade, 16 in the tenth grade, 10 in the eleventh grade, and 9 in the twelfth grade. (Agency Exhibit 16.) Although other enrollment figures were mentioned from time to time by various witnesses, at the time of the hearing before the referee, the total Bratenahl high school enrollment was clearly less than 60.

Every educator witness who expressed any type of opinion as to the feasibility of Bratenahl conducting a high

school expressed the opinion that it would be exceedingly difficult to do so and to meet state standards in view of the very limited high school enrollment in Bratenahl. Almost without exception, these opinions were expressed predicated upon generalities as to small high schools compared to large high schools, rather than specifically upon the operation of a high school by Bratenahl. Dr. Briggs, Superintendent of the Cleveland Public Schools, testified that, from his experience, it would be most difficult to maintain a high school with such a limited number of students enrolled, but expressly stated that his opinion was expressed without reference to any evaluation of the Bratenahl school. (Tr 74-76.) Perhaps the best summary of the foundation of the opinion expressed by the various educator witnesses to the effect that Bratenahl cannot maintain a high school is set forth by Dr. Bowers in Agency Exhibit 15, as follows:

> "* * * Quite frankly, I must question the propriety of maintaining a high school for either the current or reasonably anticipated enrollment in grades nine through twelve of the Bratenahl Local School District. The salient reasons for this purely personal opinion are as follows:
>
> "1. The limited number of professional staff members with whom students can be expected to have association during their four years in high school.
>
> "2. The inordinate number of separate preparations required of professional staff members to provide the current sub-minimal course offerings.
>
> "3. Although the professional staff may qualify as 'master teachers,' the degree of expertise which they can bring to each of the numerous courses for which they are responsible is necessarily limited.
>
> "4. The limited enrollment necessarily restricts the degree of socialization among students.

> "5. The existing high school program is based on inefficient allocations of financial resources, staff and facilities.
>
> "6. Expansion of the existing high school program to achieve the thoroughness required by minimum standards can only compound the current inefficient allocations of resources.
>
> "* * * The financial resources and creative administrative leadership of the Bratenahl Local School District do not offset the sheer limitations imposed by the limited number of students."

From the testimony of the various expert educator witnesses presented by the State Board, only one conclusion is possible: that it is impracticable for Bratenahl to maintain a high school, consisting of grades nine through twelve, because of the limited number of students in such grades within the district. This constitutes a sparsity of population within the contemplation of R. C. 3311.29, making compliance with the requirement of R. C. 3311.29 of maintaining grades kindergarten through twelve impracticable predicated upon the opinion of every State Board witness. In other words, there was overwhelming evidence that compliance by Bratenahl with R. C. 3311.29 is impracticable because of a sparsity of population, that is that it is impracticable for Bratenahl to maintain public schools consisting of grades kindergarten through twelve, inclusive, because of the sparsity of population in grades nine through twelve. Such conclusion is fortified by the statement of the referee during the course of his report that: "Evidence offered on the hearing tended to establish that the high school facility maintained by Bratenahl did not in all respects comply with current minimum standards (Tr. 100-107) notwithstanding what appears to be a valiant effort to do so with a limited pupil population and limited physical facilities." The referee, thus, recog-

nized the two most important factors which might well be said to render impracticable compliance by Bratenahl with R. C. 3311.29; namely, "limited pupil population and limited physical facilities."

Notwithstanding this great difficulty, Bratenahl has engaged in almost herculean efforts to maintain a high school. It has employed experts to assist it in this regard. In August, 1971, Bratenahl applied to the State Board for a charter for a high school predicated upon a multi-volume program prepared for Bratenahl by the College of Education of the University of Akron. This study program is the foundation upon which the present operation of Bratenahl High School is based. The State Board refused to consider the application for charter until then pending litigation was terminated. Nevertheless, Bratenahl commenced operation of the high school in September, 1971, and has continued operation thereof at two different locations ever since. A site for a high school was acquired by Bratenahl, and the electors of Bratenahl authorized a bond issue for the construction of a high school. However, due to the litigation, Bratenahl has been unable to sell such bonds and commence construction of a high school.

It was not until November 9, 1973, just a few days before the commencement of the hearing before the referee that Bratenahl was given any evaluation of its high school program by the State Board.

At that time, some deficiencies were noted insofar as compliance with the minimum standards established by the State Board for Ohio high schools. There are approximately 272 separate standards which a high school must meet, and the Bratenahl high school meets approximately 90 percent of those standards. (Tr-109.) The overwhelming majority of the deficiencies noted relate to facilities, rather than to the educational qualities.

Many of the deficiencies are quite technical in nature and easily corrected. For example, the State Board found that the band class was not scheduled for the required clock hours since the State Board considered the band class a laboratory class, rather than an academic class, the distinction being whether or not homework is required. Another example is a statement that one teacher is assigned subjects for which she does not hold a valid certificate. The evidence indicates, however, that the teacher in question holds a Ph.D in English and teaches journalism and drama as well as English. The State Board apparently will not recognize the certification to teach English to allow such teacher also to teach journalism and drama, although it appears that it is primarily a matter of having the teacher's certificate modified to include those courses which obviously are closely related to English.

Two of the deficiencies noted relate to the course offerings by Bratenahl, one relating to industrial art and the other to the scheduling and operation of 55 units. Of the minimum standards for Ohio high schools (stipulated exhibit 6), standard EDb-403-02(C) provides, as follows:

> "Each high school shall be comprehensive unless classified by the State Department of Education as college preparatory, vocational or island schools and shall schedule and operate each year in grades nine through twelve, in separately organized classes with students enrolled, at least 45 units of credit as follows:
>
> "(1) Art ---------- 1 unit
> "(2) Business education ---------- 5 units
> "(3) English ---------- 5 units
> "(4) Foreign language ---------- 2 units
> "(5) Home economics ---------- 3 units
> "(6) Industrial arts ---------- 3 units
> "(7) Mathematics ---------- 3 units

"(8) Music ---------- 1 unit

"(9) Physical education and health ---- 1 unit

"(10) Social studies ---------- 3 units

"(11) Science ---------- 3 units

"(12) In addition to above or other subjects ---------- 15 units

"(13) Three-year high schools may include units or their equivalent scheduled in the ninth grade of junior high schools within the school system.

"(14) A new tax supported high school organized after July 1, 1968, shall schedule and operate each year in grades nine through twelve, in separately organized classes with students enrolled, at least 55 units of credits including the units listed in (1) through (13) above."

It will be noted that, although Bratenahl is required to schedule and operate "in separately organized classes with students enrolled" a minimum of 55 units of credit, other existing high schools, except college preparatory, vocational, or island schools, are required to schedule and operate only 45 units of credit. In other words, Bratenahl, having established its high school after July 1, 1968, is required to maintain 55 units of credit; whereas, all high schools established prior thereto are required to maintain 10 units of credit less. Bratenahl's offerings and schedulings more than meet the lesser standard, but there is evidence that only 52 units of credit were scheduled and operated at the time of the hearing.

However, three additional units in vocational education were scheduled and operated by contract with the Mayfield school district. The State Board personnel were uncertain as to whether units of credit scheduled by contract at a separate vocational school could be considered as compliance with the minimum standards, including the

requirement for industrial arts. R. C. 3313.90 expressly provides that a school district may meet the minimum standards for vocational education by contract with another district.

There was evidence that the only other school districts in the state of comparable size to Bratenahl are the so-called "island schools." Such schools are expressly excepted from the unit requirements set forth above but, instead, are required to comply with standard EDb-403-02(E), which provides, as follows:

> "A school which is classified as college preparatory, vocational or island schools shall schedule each year those units which satisfy the school's stated purposes and objectives and meet minimum requirements for graduation."

The difficulty of scheduling and operating 55 units of credit for only 57 students is quite apparent. The result is that there are approximately 15 units in which only one student is enrolled in Bratenahl. (The evidence is unclear as to whether this includes the one student enrolled in three courses in vocational education at Mayfield.) There was testimony that this was educationally undersirable.

As to facilities, the evidence in many instances was somewhat sketchy as to the degree of noncompliance with minimum standards. Although the minimum enrollment of 240 students was replaced with the so-called qualitative standard of 55 units of credit, this was not carried over to the facility requirements. Rather, if anything, the facility requirements of the minimum standard are geared to an enrollment of at least 300 students. For example, standard EDb-403-08(I) requires that the library center in schools up to 1,000 students must adequately accommodate at least 8 percent of the enrollment, but with not less than 30 student stations which would be 8 percent of

375. Although one of the physical facility deficiencies of Bratenahl was insufficient student stations, the number provided for the less than 60 students was not indicated.

In many respects, Bratenahl far exceeded minimum standards, for example, standard EDb-403-04 (K) provides that the pupil-teacher ratio shall not exceed 27-1, whereas the Bratenahl ratio is only 7-1.

However, the evidence is such as to clearly indicate that Bratenahl at the time of the hearing did not *fully* meet the minimum standards for Ohio high schools as established by the State Board. However, the evidence was also quite clear that everyone, except Bratenahl, recognized that it was impracticable for Bratenahl to operate a high school with so few students, even though there was some evidence that, given time, Bratenahl could correct the deficiencies and meet all of the minimum standards.

Moreover, there was no question but that the Bratenahl Elementary School meets State Board's standards. In fact, the evidence was that, even if there be merger, virtually nothing will be changed with respect to Bratenahl Elementary School. (Tr-58 & 68.) There was no evidence that there would be any advantage to the Bratenahl students by the change of the operation of the Bratenahl Elementary School from the Bratenahl School Board to the Cleveland School Board. (Apparently, the seventh and eighth graders would be transported to a very large junior high school in Cleveland, rather than remain at the Bratenahl School.)

From the totality of the record in this case, it is quite clear, as indicated by the foregoing discussion, that, because of sparsity of population and other factors, it is impracticable for Bratenahl to maintain schools consisting of grades kindergarten through twelve since it is impracticable for it to maintain a high school, unless Bratenahl's valiant efforts to maintain a high school can result in meeting minimum standards, thereby overcoming the otherwise impracticability of maintaining a high school.

The obvious import of R. C. 3311.29 is to compel each school district to maintain within its schools grades kindergarten through twelve, inclusive, and is not designed or intended to eliminate school districts merely because of a small student population. Rather, an exception is allowed because of sparsity of population. R. C. 3311.29 contemplates that, when a school district has made every reasonable effort to comply with the requirement of maintaining grades kindergarten through twelve within its schools, but it is found to be impracticable for it to do so because of sparsity of population, such school district should not be destroyed and eliminated by dissolution and merger with an adjoining district, but, rather, such a school district should be granted an exception allowing it to continue to exist because of the impracticability of its complying with R. C. 3311.29.

In this case, however, Bratenahl is, and has been, making a valiant effort to comply with the requirements of R. C. 3311.29 and by the companion actions is seeking to compel the State Board to consider the success of such valiant efforts. From the foregoing, it is quite clear that Bratenahl is entitled to an exception pursuant to R. C. 3311.29 to enable it to attempt to comply with the requirements thereof, and, if such efforts fail because of the impracticability of compliance because of the very limited enrollment possible, then, of course, Bratenahl would be entitled to further exception because of such impracticability.

The second major issue, and the one stressed by Bratenahl in its argument, is whether or not Bratenahl,

at present, is a noncomplying district. Quite clearly, on July 1, 1968, Bratenahl did not maintain grades one through twelve within its district. However, at the time of the hearing before the referee, and today, and at all times since September, 1971, Bratenahl has in fact maintained grades kindergarten through twelve within its school district. This is exactly what R. C. 3311.29 requires. The referee, however, referred to the Bratenahl's maintenance of grades one through twelve as a "de facto," rather than a "de jure" maintenance. After first creating these artificial categories, the referee then was able to conclude in his first conclusion of law that Bratenahl, although legally existing as a school district, is not in compliance with R. C. 3311.29, since, as the referee reasons, the high school being maintained by Bratenahl has only a "de facto," rather than a "de jure" existence. Such finding is contrary to law.

In our January 9, 1973, decision in cases No. 72AP-269 & 72AP-270, involving the former litigation between the parties with respect to the February 9, 1970, order of the State Board, this court set forth two threshold questions to be resolved with respect to the controversy, which is still ongoing, stating at page 40 that:

> "Furthermore, Bratenahl in fact does exist and is operating as a school district and, at present, maintains schools with grades 1 through 12 inclusive, but without State Board sanction, and even though the exception granted by the State Board has expired. These cases involve, *inter alia*, the determination of the legal effect of such continued existence, as well as a determination of whether the State Board should have granted a further exception to Bratenahl to permit it to establish the high school which it now maintains."

The Court of Common Pleas upon remand determined in the declaratory judgment action that the legal effect of

the continued existence of Bratenahl is that Bratenahl continues to be a legal school district with full legal existence, or "de jure" existence within the language of the referee. Although, in the appeal case upon remand, the Court of Common Pleas did not expressly determine whether the State Board should have granted a further exception to Bratenahl to permit it to establish the high school which it now maintains, the Court of Common Pleas did vacate the February 9, 1970, order of the State Board but did not remand the proceedings to the State Board. In the declaratory judgment action, there was some reference to the granting of an exception to Bratenahl. There was, however, no resolution and no determination in that case by the Court of Common Pleas on whether or not the establishment of the high school by Bratenahl and the maintenance thereof by it brought it into compliance with R. C. 3311.29 in September, 1971.

However, we conclude that the establishment and maintenance of grades one through twelve within the Bratenahl school district brought it into full compliance with R. C. 3311.29 in September, 1971, and it is in continued compliance therewith. The issue of whether or not the State Board should have granted a further exception to Bratenahl could be determined only in the appeal action from the February 9, 1970, order. If, upon appeal of that order, it was concluded that the February 9, 1970, order was a valid order, obviously, what Bratenahl did thereafter could not resurrect the existence of Bratenahl, nor bring it into compliance with R. C. 3311.29. However, when the February 9, 1970, order was vacated, and no further proceedings thereon were to be held, no longer could the issue as to whether an exception should have been granted on February 9, 1970, be determined, but thereafter only the question *in praesenti* could be considered and determined.

Much of the controversy herein involves the age-old question of "which comes first." In this case, the question is whether the establishment and maintenance of a high school comes first, or whether the granting of a charter by the State Board comes first. However, from the evidence, it is clear that the State Board will not consider granting a charter for a high school until the high school is in operation, so that the State Board may evaluate the actual operation of the high school. Under the existing law, Bratenahl, as a duly legally existing school district, not only was authorized to establish schools consisting of grades one through twelve within its district, but was mandated to do so by R. C. 3311.29. Therefore, the establishment by Bratenahl in September, 1971, of public schools consisting of grades one through twelve, inclusive, was within the legal authority of Bratenahl and constituted "de jure" maintenance of grades one through twelve by Bratenahl within the language of the referee.

R. C. 3311.29 provides for dissolution of school districts which do not maintain public schools consisting of grades one through twelve inclusive; whereas, R. C. 3301.16 provides for dissolution of school districts which maintain such schools where such schools do not meet the minimum standards set by the State Board. As most clearly indicated by the record, the proceedings herein were not pursuant to R. C. 3301.16, but were pursuant solely to R. C. 3311.29.

Under R. C. 3311.29, there is no issue involved as to whether the public schools consisting of grades one through twelve meet the state minimum standards. Rather, the sole question under that section is whether or not public schools consisting of grades one through twelve are in fact maintained. The question of whether or not public schools consisting of grades one through twelve are maintained in accordance with State Board's standards is to be determined in a proceedings pursuant to R. C. 3301.16. There are important distinctions between the two proceedings not only as to the issues involved but also as to procedure. Most important is the provision of R. C. 3301.-161 for referendum with respect to an order of dissolution entered following an R. C. 3301.16 proceedings.

We repeat that R. C. 3311.29 and 3301.16 establish two distinct and separate proceedings involving distinct and separate issues. In an R. C. 3311.29 proceedings, there are two basic questions: (1) whether the school district maintains public schools consisting of grades one [now kindergarten] through twelve; and (2) if not, whether the school district is entitled to an exception pursuant to R. C. 3311.29. In an R. C. 3301.16 proceedings, the sole issue is whether or not the public schools being maintained by a school district "meet the standards for elementary and high schools as prescribed" by the State Board.

From the extensive record herein, it is quite clear that the State Board and the referee attempted to conduct what would be tantamount to an R. C. 3301.16 proceedings, disclaiming intent to do so, under the guise of an R. C. 3311.29 proceedings. The prejudicial effect of so doing is clearly indicated by the difference in the proceedings involved, the differences in the notices required, and especially the application of R. C. 3301.161. Accordingly, the R. C. 3311.-29 proceedings herein involved cannot be deemed a substitute for an R. C. 3301.16 proceedings, especially in light of the repeated statements and findings by the referee that the proceedings were solely pursuant to R. C. 3311.29.

The error in creating a "de jure" maintenance of grades kindergarten through twelve with respect to R. C. 3311.29 is most clearly exemplified when applied to exist-

ing school districts. The so-called "de jure" requirement could be utilized to dissolve any school district in the state (regardless of whether such district in fact maintains grades kindergarten through twelve) by receiving evidence and making a determination that the schools in fact maintained by such school district are not "de jure" maintained because they do not comply in all respects with State Board minimum standards. Clearly and obviously, R. C. 3311.29 was not designed as a substitute for an R. C. 3301.16 determination as to whether or not the schools maintained by a school district meet the minimum standards established by the State Board. As indicated, we conclude that in an R. C. 3311.29 proceedings, the issue of whether schools maintained by a school district meet State Board minimum standards cannot be determined. The issue in an R. C. 3311.29 proceedings is whether or not the school district maintains within its schools grades kindergarten through twelve or, if not, whether it is entitled to an exception.

The issue of compliance with minimum standards prescribed by the State Board is to be determined by an R. C. 3301.16 proceedings, not an R. C. 3311.29 proceedings.

Turning now to specific consideration of the assignments of error, the first assignment of error is not well taken. By this assignment of error, Bratenahl contends that the Court of Common Pleas erred in denying its request to admit additional evidence. However, the record reflects that the additional evidence sought to be presented did not relate to the two basic issues which we have found to be presented hereby, but, instead, relate to the issue not presented hereby but as to which the referee erroneously admitted voluminous evidence. In fact, most of the evidence in the record relates to the issue of minimum

standards which, as we have indicated above, is not presented by this case.

Although both the referee and State Board disclaimed proceeding pursuant to R. C. 3301.16, much of the evidence adduced before the referee would be pertinent only to such a hearing. Although the record clearly indicates that the proceedings hereunder were pursuant only to R. C. 3311.29, as indicated above, certain of the findings could properly be made only pursuant to an R. C. 3301.16 hearing. Since it is clear that only an R. C. 3311.29 hearing was intended, no proper notice of a hearing pursuant to R. C. 3301.16 was given. Accordingly, to that extent and for that reason, the second assignment of error is well taken.

For the reasons set forth above, the third assignment of error is well taken. As we have set forth above, R. C. 3311.29 was not properly applied either with respect to the granting of exceptions or with respect to the determination of compliance by Bratenahl with said section.

Likewise, the fourth assignment of error is well taken for the reasons set forth above, which we find unnecessary to repeat. The dissolution order was neither supported by reliable, probative, and substantial evidence, nor was it in accordance with law.

For the foregoing reasons, the first assignment of error is overruled, and the second, third, and fourth assignments of error are sustained; and the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this decision, including the entering of an order reversing and vacating the October 14, 1974, order of the State Board for the reasons set forth above.

Judgment reversed and remanded

STRAUSBAUGH, *P. J.*, concurs.

HOLMES, J., dissenting.

After a thorough review of the multitudinous record and transcripts of this matter, I must come to a contrary conclusion from that of my colleagues.

In one of the numerous decisions of this court in this case, dated January 9, 1973, consolidated cases numbered 72AP-269 and 72AP-270 (1973 Decisions, page 34), remanding the matter to the Common Pleas Court, we stated: "The mandate of this court was to pursue further proceedings consistent with the opinion rendered April 27, 1971." After again repeating most of the pertinent portions of the prior decision, this court stated: "That mandate contemplated a determination of the appeal upon its merits. * * * Bratenahl contends that it was not afforded a proper hearing in accordance with R. C. 119.06 to 119.10. * * * If no proper hearing was held so that there is no evidence in the record, then the order would not be so supported and remand for a proper hearing might be required."

The Common Pleas Court of Franklin County did so in turn remand the matter to the State Board of Education for a hearing in accordance with Chapter 119. The judgment entry of the Common Pleas Court referred to this court's prior decision, but yet only referred to a hearing pursuant to R. C. 3311.29.

The resolution of the state school board, attached to the notice for the administrative hearing, set forth the fact of Bratenahl's request dated January 28, 1970, for approval of the proposed high school programs and also its request for a 15-month extension for the exception. Also the resolution noted the state school board's denial of such requests as entered on February 9, 1970. The record would show that the February 9th order was vacated by the Common Pleas Court. However, the requests for recognition of its high school programs, as had

been submitted by Bratenahl, were ostensibly what was before the board for its determination, even though the Common Pleas order seemingly had limited the issue to that of a determination of an exception.

Bratenahl, in its response to the notice of the state school board, requested a Chapter 119 hearing, which request was dated October 4, 1973. Such request for hearing indicated what subject matter should be among those upon which evidence should be adduced, as follows:

> "Bratenahl Local School District (Bratenahl) requests a hearing pursuant to R. C. 119.07, with respect to * * *
>
> "2. The failure of the State Board, the Ohio Department of Education, and the Superintendent of Public Instruction (Essex) to act upon Bratenahl's requests for issuance to it of a high school charter under R. C. 3301.16.
>
> "* * *
>
> "In making this request, Bratenahl has noted that * * * (2) the issuance of a high school charter under R. C. 3301.16 pursuant to previous requests therefor by Bratenahl is governed by the provisions of Chapter 119 of the Revised Code."

Even though the record indicates that there were preliminary hearings before the referee, there is no record of any rulings as to the scope of the hearings at such time. At the outset of the administrative hearing, Bratenahl requested that the hearing go forth on the more limited issue of the exception and the factors determinative thereof as set forth in R. C. 3311.29.

The referee, in response to such motion of limitation, stated that the proceeding would go forth as one under R. C. 3319.29, but that the parties would be given a wide latitude in presenting evidence and testimony, subject to possible objections to the nature of such evidence.

As previously stated, the evidence as presented by the state school board went rather in depth as to the inspections as made of the physical facilities of Bratenahl, and the items found by such inspection group to have constituted violations of state minimum standards. Additionally, Bratenahl did introduce evidence by way of its superintendent of schools, upon its current school programs, and counsel for Bratenahl made reference to such programs that might be considered by the referee in relation to the "other factors" as specifically stated in this section relating to the granting of exceptions.

After an evaluation of all the foregoing facts and circumstances that existed at the time of this administrative hearing pursuant to R. C. 3311.29, I must conclude that the recommendations of the referee, and as approved by the board which resulted in the order of the board dissolving Bratenahl Local School District, was supported by reliable, probative and substantial evidence, and was supported by law.

At the outset, although the notice of the Chapter 119 administrative hearing referred only to the issue of the exception as provided for by R. C. 3311.29 and did not specifically state that such was to be a hearing upon application for a high school charter, pursuant to Chapter 3301, the resolution of the state school board which occasioned such notice contained matters which were in reference to state school board standards.

The notice as given to Bratenahl reasonably notified this school district of the nature of the hearings to be conducted. Additionally, the referee, in defining the scope of the hearings, stated that a degree of latitude would be offered Bratenahl as well as to the state school board to present evidence not only on matters of topography and sparsity of population, but "other factors" which might make compliance impracticable.

I feel that not only within this court's prior decision remanding such matter for a formal administrative procedure hearing, and within the state board's resolution of September 10, 1973, the broader issues of the Bratenahl educational program was a matter for determination at the administrative hearing therefor. It is my view that the referee did in fact permit evidence of the quality of the program, and compliance or noncompliance with state standards, not on the question of whether a charter should be issued, as per R. C. 3301.19, but whether the grades 1 through 12 as being operated at that time by Bratenahl, did in fact meet state standards. In doing so, the referee merely was applying what he believed this court to have previously stated within its decision.

Based upon the evidence presented by both sides as to the scope and quality of the Bratenahl high school program, the referee found that the high school did not meet the state's minimum standards. Thus, the referee concluded that on the issue of whether an exception should be granted pursuant to the dissolution statute, Bratenahl was still in violation of R. C. 3311.29 in that the operation of grades 1 through 12 was not in accordance with the regulations, and therefore was not a *de jure* operation of such classes.

It is my view that Judge Gillie correctly stated what permissibly could have been considered by the referee in this administrative hearing. The judge stated as follows in his decision affirming the order of the state school board:

> "The Bratenahl Local School District argues that state standards for a school or school system may not be read into section 3311.29. This is true, and yet, it is the court's opinion that if we accept the premise that the state and local boards of education are, by the provisions of section 3301.07, Revised Code of Ohio,

under a mandate to provide quality education, section 3311.29, Revised Code, may not be read to allow the operation of a school lacking essential qualifications comprising state standards. The position that a school which does not meet state standards complies with section 3311.29, Revised Code, is untenable."

This has been a prolonged, difficult, and sometimes bitter, case, but it is my honest opinion that those who have been legislatively charged with the responsibility of making professional determinations as to the best educational programs for the students, individually as well as collectively, in this state, have reviewed the facts and circumstances of this case, and have entered their professional determinations and orders.

I am unable to state that the trial court erred in deciding that the determinations of these professionals, as such determinations have found their way into the order of the Board of Education of the State of Ohio here are not based upon reliable, probative and substantial evidence; nor can I say that such order is not in accordance with law.

Conversely, I believe that the findings of the referee and the order of the State Board of Education are supported by reliable, probative and substantial evidence, and I believe that such order of the board was in accordance with law.

Therefore, I would overrule all of the assignments of error of the appellant and would affirm the judgment of the Common Pleas Court of Franklin County.

[12] SUPREME COURT OF OHIO MARCH 22, 1978
DECISION

Nos. 77-171 and 77-172

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

THE STATE, ex rel. BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee,

v.

STATE BOARD OF EDUCATION, *et al.*,
Appellants.

BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Appellee,

v.

STATE BOARD OF EDUCATION, *et al.*,
Appellants.

School districts—To maintain public school—R. C. 3311.29—Exceptions—Refusal of State Board of Education to grant—Not an "adjudication"—Not reviewable by court.

1. The refusal of the State Board of Education to grant a local school district an additional exception to the requirements of R. C. 3311.29 does not constitute an "adjudication" within the meaning of R. C. 119.01 (D).

2. In the absence of an "adjudication" as defined in R. C. 119.01(D), the right to notice and hearing does not obtain and, consequently, in such a case the Court of Common Pleas of Franklin County lacks jurisdiction under R. C. 119.12 to review actions taken by a state administrative agency. (*Fortner v. Thomas*, 22 Ohio St. 2d 13; *M. J. Kelley Co. v. Cleveland*, 32 Ohio St. 2d 150, approved and followed.)

(Nos. 77-171 and 77-172—Decided March 22, 1978.)

APPEALS from the Court of Appeals for Franklin County.

This cause involves appeals from decisions rendered by the Court of Appeals for Franklin County concerning a dispute between the Board of Education of the Bratenahl Local School District (Bratenahl) and the State Board of Education of Ohio (state board).

The dispute dates back to 1968. At that time, R. C. 3311.29 provided that:

"* * * after July 1, 1968, no school district shall exist which does not maintain within such district public schools consisting of grades one through twelve, inclusive, and any such existing school district not maintaining such schools after such date shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily * * *." The statute further provided that "* * * the state board of education may authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable * * *."

Because Bratenahl, as an unchartered school district, did not maintain the required number of grades in 1968, it passed a resolution on June 8, 1968, requesting that the state board grant it a two-year exception, whereupon,

effective July 1, 1970, the Bratenahl Local School District would be dissolved and its territory joined with the Cleveland City School District. On June 10, 1968, the state board granted the request, specifically resolving that the district would be dissolved on the date indicated by Bratenahl in its request. No appeal was taken from this resolution.

Although the effective date of dissolution had been agreed upon, Bratenahl, by resolution dated January 28, 1970, requested a further postponement of the dissolution. The request was denied by the state board on February 9, 1970. It is from this action that Bratenahl sought relief in the Court of Common Pleas.

Upon motion of the state board alleging that the February 9, 1970, order was not a final, appealable order under R. C. Chapter 119, the Court of Common Pleas dismissed Bratenahl's administrative appeal. However, the Court of Appeals reversed and remanded the judgment, holding that the order of the state board was reviewable by the lower court. (A motion to certify the record along with a motion for a restraining order to prevent Bratenahl from opening a high school were denied by this court.)

Thereafter, several issues not relevant to the instant cause were litigated in further proceedings before the Court of Common Pleas and the Court of Appeals. The appeals *sub judice* are taken from decisions rendered by the Court of Appeals in December 1976, wherein the court in case No. 76AP-67 again reversed a decision of the Court of Common Pleas affirming an order of dissolution by the state board and in cases Nos. 74AP-458 and 76AP-384 issued a writ of mandamus, ordering, *inter alia*, that the state board determine whether the Bratenahl Local School District should be granted a charter under R. C. 3301.16.

Appeal was taken to this court from the decision of the Court of Appeals rendered in cases Nos. 74AP-458

and 76AP-384 as a matter of right pursuant to Section 2 (B) (2) (a) (i) of Article IV of the Ohio Constitution (case No. 77-172). Case No. 76AP-67 is a companion appeal and comes before this court upon an allowance of a motion to certify the record (case No. 77-171). The causes have been consolidated herein for argument and final determination.

SWEENEY, J. The central issue in this cause is whether in the first instance, Bratenahl could appeal the decision of the state board rendered in 1970, wherein the board denied Bratenahl's request for an additional exception.[1] The Court of Appeals has held in effect throughout the lengthy dispute that Bratenahl had the right under R. C. 119.12 to bring an appeal to the Court of Common Pleas challenging the state board's action of refusing to grant the district an additional exception. We disagree.

Before an appeal can successfully be brought to the Court of Common Pleas of Franklin County under the provisions of R. C. Chapter 119, the proceedings of the administrative agency must have been quasi-judicial in nature. Section 4(B), Article IV of the Ohio Constitution; paragraph one of the syllabus in *Fortner v. Thomas* (1970), 22 Ohio St. 2d 13. In employing the term "quasi-judicial," this court held in paragraph two of the syllabus in *M. J. Kelley Co. v. Cleveland* (1972), 32 Ohio St. 2d 150, that:

"Proceedings of administrative officers and agencies are not quasi-judicial where there is no requirement for notice, hearing and the opportunity for introduction of evidence."

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[1] Irrespective of the fact that this issue was decided by the Court of Appeals in a prior decision in which this court denied certification of the record, this court is not precluded from reviewing the issue. Paragraph two of the syllabus in *Pengelly v. Thomas* (1949), 151 Ohio St. 51.

Under R. C. 3301.13, it is provided that:

"* * * In the exercise of any of its functions or powers, including the power to make rules and regulations and to prescribe minimum standards the department of education, and any officer or agency therein, shall be subject to Chapter 119 of the Revised Code."

Thus, this court is confronted with the issue of whether Bratenahl was entitled to notice and a hearing before the state board under the provisions of R. C. Chapter 119 on the matter of whether the Bratenahl Local School District was entitled to an additional exception under the provisions of R. C. 3311.29 in 1970.

R. C. 119.06 requires that "[n]o adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with section 119.01 to 119.13, inclusive * * *." "Adjudication" is defined under R. C. 119.01 (D) as "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person,[2] but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature."

In construing the above statutory provisions together, it is evident that before an order based on an "adjudication"' may be issued by the state board, the board must first provide notice and a hearing. Alternatively, if the order is not based on an "adjudication," it is immaterial that the state board does not furnish parties an opportunity to be heard, since the order, so long as it is authorized by law, is still valid.

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[2] The term "person," defined under R. C. 119.01 (F), includes a "person, firm, corporation, association, or partnership." The court does not reach the issue of whether a local board of education is a "person" within the meaning of this section. See *State, ex rel. Osborn v. Jackson* (1976), 46 Ohio St. 2d 41, 46-50.

In the instant cause, the state board did not provide Bratenahl with notice and an opportunity to be heard before refusing to grant the Bratenahl Local School District an additional exception from the requirements of R. C. 3311.29. However, as this court noted in construing language found in R. C. 2506.01 (the counterpart to the judicial review provisions of R. C. Chapter 119 for administrative units of the various political subdivisions in this state) similar to that found in R. C. 119.01(D), "* * * a refusal to act does not determine any rights, duties, privileges, benefits, or legal relationships * * *" of a complaining party. *State, ex rel. Benton's Village Service, v. Usher* (1973), 34 Ohio St. 2d 59, 61. Absent such a determination, there cannot be an "adjudication." Clearly the act of refusing to change one's position is not equivalent to the act of deciding in the first instance which position to take among several alternatives. The "rights," "privileges," and "benefits" of the Bratenahl Local School District to remain in existence after July 1, 1968, were determined by the state board in its resolution dated June 10, 1968, and were not in some way resurrected or placed back into issue upon the subsequent request of appellee in 1970 for an additional exception.

Because the refusal to grant the Bratenahl Local School District an additional exception under R. C. 3311.29 was not an "adjudication" within the meaning of R. C. 119.01(D), the state board's action was valid, despite the fact there was no notice or opportunity to be heard afforded Bratenahl. Absent the rights to notice and a hearing, the refusal of the state board to postpone the predetermined date of dissolution of the Bratenahl Local Schools was not quasi-judicial in nature. *Kelley, supra;* see, also, *Haught v. Dayton* (1973), 34 Ohio St. 2d 32, 35. Consequently, there was no right of appeal under R. C.

119.12 *(Fortner, supra)* and the Court of Common Pleas correctly dismissed Bratenahl's cause of action. This court concludes that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the state board.

Because the judgments of the Court of Appeals in cases Nos. 77-171 and 77-172 are based on that court's initial erroneous determination that the state board's 1970 refusal was a reviewable order, they are necessarily reversed.

Judgment reversed in case No. 77-171.
Judgment reversed in case No. 77-172.

O'NEILL, C. J., HERBERT and W. BROWN, JJ., concur.
CELEBREZZE, P. BROWN and LOCHER, JJ., dissent.

CELEBREZZE and LOCHER, JJ., dissenting. We must respectfully dissent from the majority opinion in view of its egregious result and the tenuous legal reasoning advanced as necessitating said result. The record portrays a conflict of over nine years, during which time Bratenahl has striven to maintain its local school district against a steadfast state board's repeated attempts to dissolve and merge the district with a large neighboring district.

Over this period of time the residents of Bratenahl have aptly manifested their genuine concern for the preservation of their local district. Bratenahl, confronted by noncompliance with R. C. 3311.29 (which requires that no school district shall exist after July 1, 1968, which does not maintain public schools consisting of grades 1 through 12), sought an exception, on June 8, 1968, from compliance as provided for in that statute. The state board found a two-year extension to be desirable in view of the overcrowded conditions of neighboring Cleveland school district facilities. It should be noted that, prior to July 1, 1968, a Department of Education regulation required a

minimum of 240 students for the establishment of a new high school. Thus, Bratenahl was foreclosed from attempting to comply with the legislative mandate of R. C. 3311.29 at the time it requested the two-year exception. Thereafter, the 240 student standard was replaced with the requirement of offering 55 units of credit and thus theoretically Bratenahl could operate a high school after July 1, 1968.

Upon ascertainment of the change in the standard, Bratenahl commenced efforts to establish a high school. Stanton Leggett & Associates was retained to conduct a feasibility study and develop plans for a high school. Apparently, the study indicated a 15-month period would be necessary for establishment of a viable high school program. Bratenahl therefore requested the state board to grant a further exception from the effect of R. C. 3311.29.

On February 9, 1970, without having afforded Bratenahl notice or a hearing, the state board, through formal order, summarily denied Bratenahl's request. After lengthy adjudication, the Court of Common Pleas of Franklin County entered a judgment, on August 24, 1973, vacating the order of the state board denying Bratenahl's request for an extended exception. In addition, on August 30, 1973, the Court of Common Pleas entered a declaratory judgment expressly finding Bratenahl to be a legally existing school district and entitled to an R. C. Chapter 119 hearing on its request for an extended exception.

During this tumultuous period, Bratenahl obtained a stay of execution from the state board's denial order and then proceeded to turn a theoretical possibility into a reality. Upon the refusal by the Ohio Department of Education to render technical and professional assistance, Bratenahl engaged the assistance of the School of Education of the University of Akron. In this manner Bratenahl

developed it own high school educational program. Hiring the necessary instructors and administrators, Bratenahl opened its high school in September of 1971, temporarily utilizing an abandoned Nike missile base for its physical facilities. During a lull in this litigious marathon, Bratenahl residents voted approval of a bond issue and additional operating funds, and since September 1975 a newly constructed, specially designed, centrally located high school has been operational within the local school district.

On November 15, 1973, an R. C. Chapter 119 hearing was finally convened, and, pursuant to the referee's findings, which were accepted *in toto,* the state board, on October 15, 1974, issued an order dissolving the Bratenahl local school district. As specific reasons for this order, the board found Bratenahl was not in compliance with R. C. 3311.29 on July 1, 1968 (the effective date in the statute), on February 9, 1970 (the date the request for an extended exception was denied), and on July 1, 1970 (the date the original exception expired).

In our opinion, Bratenahl's admitted noncompliance on the three preceding dates is immaterial to the resolution of the case *sub judice* in light of the Court of Common Pleas' decision, on August 30, 1973, holding that Bratenahl was a legally existing school district. The state board did not prosecute an appeal from this decision.

Inexplicably, the state board held further that Bratenahl was not in *de jure* compliance with the statute on October 15, 1974 (the date of the order of dissolution). However, it is undisputed by the parties that Bratenahl, since September of 1971, has operated a school system consisting of grades 1 through 12. Because this is the only issue involved in the determination of compliance with R. C. 3311.29, we find that the state board's actions on October 15, 1974, had been rendered moot by the course of preceding events.

It is clear that, as a legally existing local school district, Bratenahl's request for a state charter is entitled to consideration by the state board. Accordingly, the decision of the Court of Appeals allowing Bratenahl's complaint for a writ of mandamus should also be affirmed by this court, and the state board should be directed to determine if the local school district presently meets minimum state standards.

Bratenahl's desire for autonomy is not of recent vintage, but is evident from the genesis of the city. In the late 1890's, Bratenahl, then a part of the city of Glenville, opted not to acquiesce in Glenville's decision to join the city of Cleveland. Concomitant with their formation as an autonomous local government, the residents of Bratenahl established their own independent school system, which they have maintained until this day.

The majority's opinion countenances a bureaucratic destruction of nearly a century of local control against the expressed desires of those affected by the conditions of Bratenahl's schools, *i. e.*, the local school district's residents. This approbation is premised upon a legalistic legerdemain that permits the state board to ignore Bratenahl's compliance at the time of the hearing and to dissolve a viable local school district because of a temporary period of noncompliance in the past.

It is common knowledge that Ohio schools are currently in a condition of severe economic plight. We can perceive no logic in the dissolution of a complying local school district, whose residents have willingly provided financial support for their schools. This pernicious action on the part of the state board may well have the effect of replacing the enthusiasm and interest Bratenahl residents have shown in their schools with a general mood of disillusionment, cynicism and apathy.

For the foregoing reasons we would affirm the decisions of the Court of Appeals. We, therefore, respectfully dissent.

[13] DECISION OF THE OHIO SUPREME COURT

(Decided May 16, 1979)

No. 78-802

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

THE STATE, *ex rel.* BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT,
Appellant,

v.

STATE BOARD OF EDUCATION OF OHIO *et al.*,
Appellees.

THE STATE, EX REL. BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT, APPELLANT, *v.* STATE BOARD OF EDUCATION OF OHIO ET AL., APPELLEES.

Mandamus and prohibition—To prevent dissolution of school district—Complaint dismissed, when—Prior court decision res judicata to instant action.

APPEAL from the Court of Appeals for Franklin County.

This appeal by the Bratenahl board of education (Bratenahl) is from a judgment, entered, *sua sponte,* by the Court of Appeals for Franklin County. Bratenahl filed a complaint in prohibition and mandamus in that court on June 28, 1978, seeking to stop the dissolution of the Braten-

ahl Local School District and to order the State Board of Education (state board) to act on Bratenahl's request for evaluation and accreditation.

The day after the complaint was filed, June 20, 1978, the Court of Appeals, in a unanimous decision, determined that the complaint failed to state a claim upon which relief could be granted, citing this court's opinion in *State, ex rel. Bd. of Edn., v. State Bd. of Edn.* (1978), 53 Ohio St. 2d 173, which held that the Bratenahl Local School District was properly dissolved by the state board on July 1, 1970.

As set forth in this court's opinion in *State, ex rel. Bd. of Edn., supra,* this lengthy dispute between the instant parties dates back to 1968, at which time both Bratenahl and the state board *agreed* by written resolution and order that the Bratenahl Local School District would be dissolved, effective July 1, 1970, because the school district did not have the 12 grades of school required at that time by R.C. 3311.29. Bratenahl did not appeal.

Bratenahl did not request a further postponement of the dissolution date until 1970. Upon the denial of this request, Bratenahl commenced litigation against the state board, and every proceeding since that time has had its origin in the state board's refusal to change its 1968 order.

Bratenahl filed its notice of appeal in the Court of Common Pleas of Franklin County, regarding the state board's refusal to postpone dissolution. The court determined that the action of the state board was not an "adjudication," as the term is used in R. C. Chapter 119, and found that Bratenahl had no right of appeal.

On further appeal to the Court of Appeals, the court held that the action of the state board in 1970 was reviewable and remanded the cause to the Court of Common Pleas. This court denied the state board's motion to certify the record.

As a result of the Court of Appeals' remand, an administrati · hearing was eventually commenced. Upon its conclusion, the state board, adopting the findings of the referee, ordered in October of 1974 that the school district be dissolved and merged with the Cleveland City School District.

The Court of Common Pleas affirmed the state board's October 1974 dissolution order. However, the Court of Appeals again reversed the Court of Common Pleas and, in a companion case, issued a writ of mandamus, ordering, *inter alia,* that the state board determine whether the school district should be granted a charter under R. C. 3301.16.

This court then granted the state board's motion to certify the record and consolidated the cause with the companion mandamus action before the court at that time as a matter of right.

The decision of this court, on March 22, 1978, in *State, ex rel. Bd. of Edn., supra,* held that the 1970 refusal of the state board to grant an extension was not "appealable," and that the school district was properly dissolved on July 1, 1970.

Bratenahl has appealed to this court from the June 29, 1978, decision of the Court of Appeals. The cause is now before the court as a matter of right.

Per Curiam. Bratenahl argues that the Court of Appeals erred when it dismissed its complaint *sua sponte,* by finding that *State, ex rel. Bd. of Edn., supra,* is *res judicata* to this action. In support of its contention, Bratenahl maintains that this court's decision in that cause dealt only with the narrow issue of whether the 1970 refusal of the state board to grant an additional exception was an "adjudication," whereas here they are attacking the October 1974 dissolution order, issued four years later.

The argument is without merit. This court in *State, ex rel. Bd. of Edn., supra,* stated in the syllabus as follows:

"1. The refusal of the State Board of Education to grant a local school district an additional exception to the requirements of R. C. 3311.29 does not constitute an 'adjudication' within the meaning of R. C. 119.01 (D).

"2. In the absence of an 'adjudication' as defined in R. C. 119.01 (D), the right to notice and hearing does not obtain and, consequently, in such a case the Court of Common Pleas of Franklin County lacks jurisdiction under R. C. 119.12 to review actions taken by a state administrative agency *(Fortner v. Thomas,* 22 Ohio St. 2d 13; *M. J. Kelley Co. v. Cleveland,* 32 Ohio St. 2d 150, approved and followed.)"

Therefore, since the Court of Common Pleas lacked subject matter jurisdiction to review the matter, the decisions of the appellate court, which held that the 1970 refusal of an additional extension was reviewable, were reversed.* The majority opinion in *State, ex rel. Bd. of Edn., supra,* then concluded, at page 178, "that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the state board."

The October 1974 dissolution order was the result of a R. C. Chapter 119 hearing, which was begun in response to the appellate court's decision which found the 1970 refusal to extend the time of dissolution to be an appealable order. However, this court in *State, ex rel. Bd. of Edn., supra,* clearly held, in reversing the Court of Appeals, that the 1970 refusal was not an appealable order; and, therefore, quite properly concluded that the school district was dissolved as of July 1, 1970, pursuant to the unappealed and agreed upon 1968 order. Appellant's attempt to attack the October 1974 order of the state board though an extra-

ordinary writ is without foundation. There simply was nothing to be dissolved in 1974. The fact that the state board initiated a R. C. Chapter 119 hearing, resulting in the 1974 dissolution order, cannot now be utilized to the prejudice of the state board. The reality of the situation is that it is immaterial whether the 1974 order is valid or invalid. The 1974 order is now nothing but a nullity.

The decision of the Court of Appeals is, therefore, affirmed.

Judgment affirmed.

CELEBREZZE, C. J., HERBERT, W. BROWN, P. BROWN and SWEENEY JJ., concur.

LOCHER, J., concurs in the judgment only.

HOLMES, J., not participating because he was a Judge of the Court of Appeals which heard the original case involving the same parties.

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*Even though this court denied certification of the record from the Court of Appeal's initial judgment which found the 1970 refusal to be reviewable, the court was not precluded from reviewing the issue in its decision in *State, ex rel. Bd. of Edn., supra* (53 Ohio St. 2d 173). See paragraph two of the syllabus in *Pengelly v. Thomas* (1949), 151 Ohio St. 51.

[14] TRIAL COURT AUGUST 8, 1973 DECISION VACATING FEBRUARY 9, 1970 STATE BOARD ORDER

Case No. 239,508

COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL
LOCAL SCHOOL DISTRICT,
Appellant,

vs.

STATE BOARD OF EDUCATION,
Appellee.

DECISION

SHOEMAKER, *J.*

Upon consideration of the record in this case, the Court makes the following rulings:

1. The State Board of Education is an agency governed by the Ohio Administrative Procedure Act, R. C. Chapter 119. This was the holding of the Franklin County Court of Appeals in its opinions of May 27, 1971 and January 9, 1973, in this case and its companion and also the express provision of R. C. Section 3301.13.

2. The request of Appellant Bratenahl for the admission of "newly discovered evidence" is DENIED. The term "newly discovered evidence" as used in R. C. Section 119.12 only encompasses evidence in existence at the time the agency made its decision, not evidence of later events. Such evidence would, however, be admissible at a subsequent Chapter 119 hearing.

3. The State Board of Education did not hold a proper Chapter 119 hearing in this matter, as evidenced by the Minutes of the State Board's February 9, 1970 meeting.

4. The State Board failed to comply with the requirements of R. C. Section 119.12 when the State Board failed to file a transcript of the tape recording made of the February 9, 1970 meeting.

5. The February 9, 1970 Resolution of the State Board of Education, the subject of this appeal, is hereby VACATED as that decision was reached without a proper Chapter 119 hearing.

Counsel for Appellant may prepare an Entry consistent with this decision.

/s/ FRED J. SHOEMAKER, *Judge*

[15] TRIAL COURT JUDGMENT AUGUST 24, 1973 VACATING FEBRUARY 9, 1970, STATE BOARD ORDER

Case No. 239,508

COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

BOARD OF EDUCATION, BRATENAHL
LOCAL SCHOOL DISTRICT,
Appellant,

v.

STATE BOARD OF EDUCATION, *et al.,*
Appellees.

JUDGMENT ENTRY

This cause came on for consideration upon the record in this case, and upon consideration of same, the Court finds, for the reasons stated in the decision of this Court rendered herein on August 8, 1973, that the request of Appellant Bratenahl for the admission herein of "newly discovered evidence" is not well taken and it is, therefore, DENIED; and that the February 9, 1970, Resolution of the State Board of Education, the subject of this appeal, was reached without a proper Chapter 119 hearing and is, therefore, VACATED.

IT IS, THEREFORE, ORDERED, ADJUDGED, and DECREED, that the February 9, 1970, Resolution of the State Board of Education is hereby VACATED.

Exceptions are reserved to Appellees.

/s/ FRED J. SHOEMAKER, *Judge*

[16] COURT OF APPEALS DECEMBER 16, 1976 DECISION ORDERING ISSUANCE OF WRIT OF MANDAMUS

Nos. 74AP-458 & 76AP-384

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

STATE OF OHIO, EX REL. BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT,

Relator,

v.

STATE BOARD OF EDUCATION OF OHIO, DEPARTMENT OF EDUCATION OF OHIO,

and

MARTIN W. ESSEX, Secretary, State Board of Education of Ohio,

Respondents.

DECISION

WHITESIDE, *J.*

These original actions in mandamus are companion cases to an appeal before this court in the case of *Bd. of Education, Bratenahl Local School District, v. State Bd. of Education*, case No. 76AP-67, the decision in which is being rendered simultaneously with the decision herein, and to which decision reference is hereby made.

As has been previously determined, and is again determined in case No. 76AP-67, Bratenahl is a legally existing school district in the state of Ohio, operating schools in accordance with R. C. 3311.29, including a four-year high school, which has been operated since September, 1971.

On several occasions in the past, Bratenahl has applied to the State Board for an evaluation of Bratenahl's high school program and for the issuance of a charter for such high school, including applications on August 18, 1971, June 27, 1975, and December 11, 1975. It is clear that the State Board has taken no action upon such requests, primarily because of the existence of the issues resolved in the companion case on appeal in case No. 76AP-67.

Unfortunately, the State Board has not established a precise procedure to be followed in connection with the issuance of a charter to a high school. However, the evidence herein indicates that the school must be in operation before it can be evaluated for a charter. R. C. 3301.16 places a duty upon the State Board to charter high schools, leaving to the State Board the procedure to be followed in connection therewith. Apparently, the State Board would follow the procedure established with respect to the chartering of an elementary school. R. C. 3301.12(A) places upon the Superintendent of Public Instruction a duty of providing technical and professional assistance and advice to all school districts in reference to all aspects of education, which would include Bratenahl's high school. R. C. 3301.07(B) places a duty upon the State Board to provide consultive and advisory services to all school districts with respect to the same matters. Only a very limited amount of such assistance has been afforded Bratenahl during the lengthy history of the litigation out of which these actions stem, again primarily because of the existence of the issues resolved in the appeal case, No. 76AP-67.

These actions are before the court upon motion of relator and cross-motion of respondents for summary judgment. Finding no genuine issue of any material fact, and that, when the evidence is construed most strongly in favor of respondents, relator is entitled to judgment as a matter of law, relator's motion for summary judgment

is sustained, and that of respondents is overruled.

There is, therefore, a clear legal duty upon the State Board to comply with R. C. 3301.07, 3301.12(A), and 3301.16 with respect to the Bratenahl High School, including, but not limited to, the duty to determine whether or not such high school should be granted a charter.

Accordingly, a writ of mandamus will issue, ordering the State Board to do so.

Writ Granted.

STRAUSBAUGH, *P. J.*, concurs.
HOLMES, *J.*, dissents.

HOLMES, *J.*, dissenting.

It is my belief that the position that I have expressed within the consideration of the administrative appeal, case number 76AP-67, is fully determinative of this mandamus action. The decision and recommendation of the referee was, as stated in my dissent in the administrative appeal, based upon the hearing of evidence from both parties as to the merits of the educational facility of Bratenahl, and whether or not the state educational standards had been met in relation to the application for an exception to R. C. 3311.29. Although not technically so, this hearing had within it the substance of a hearing as to whether Bratenahl Local School District could at that time meet the state standards for the issuance of a charter.

The findings of fact and conclusions of law as entered by the referee, and as approved and adopted by the State Board of Education, were tantamount to answering the question as to whether Bratenahl did indeed measure up to the state standards, in the negative.

Accordingly, I would hold that there has been no clear showing for the right of the issuance of a writ of

mandamus and, therefore, I would deny the complaints seeking a writ of mandamus.

[17] COURT OF APPEALS DECEMBER 22, 1976 JUDGMENT ORDERING ISSUANCE OF WRIT OF MANDAMUS

Nos. 74AP-458 & 76AP-384

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

STATE OF OHIO, EX REL. BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT,

Relator,

v.

STATE BOARD OF EDUCATION *et al.*,

Respondents.

JOURNAL ENTRY OF JUDGMENT

This cause came on to be heard on the complaints in mandamus, the answers thereto, the stipulations, and motions, briefs, and oral arguments of counsel, and upon consideration thereof, the court finds that relator's motions for summary judgment are sustained, and those of respondents are overruled, and that relator is entitled to a writ of mandamus herein. It is therefore ordered that a writ of mandamus issue against the State Board of Education, directing them to comply with R. C. 3301.07, 3301.12 (A), and 3301.16, with respect to the Bratenahl High School, including, but not limited to, the duty to determine whether or not such high school should be granted a charter.

/s/ DEAN STRAUSBAUGH, *Judge*

/s/ ALBA WHITESIDE, *Judge*

Supreme Court, U. S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

In The

United States Supreme Court

OCTOBER TERM 1979

CASE NO: 79-1288

ETHAN WILT, et. al.,

Petitioners

— vs —

STATE BOARD OF EDUCATION, et. al.,

Respondents.

BRIEF OF THE BOARD OF EDUCATION, CLEVELAND CITY SCHOOL DISTRICT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

United States Supreme Court

OCTOBER TERM 1979

CASE NO. 79-1288

ETHAN WILT, et. al.,

Petitioners

— vs —

STATE BOARD OF EDUCATION, et. al.,

Respondents.

BRIEF OF THE BOARD OF EDUCATION, CLEVELAND CITY SCHOOL DISTRICT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished opinions of the District Court and the Court of Appeals are reproduced in Petitioner's Appendix, (A1, A8, and A9) and in the Respondent's Appendix (RA1, RA2). The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 608 F.2d 1126, and is reproduced in Petitioner's Appendix (A2).

JURISDICTION

Review is sought of the judgment of the Sixth Circuit Court of Appeals entered November 21, 1979 (A 2); a Petition for Rehearing was denied November 28, 1979 (A 1).

That decision is wholly in accord with sound and well-settled principles of law. The Petition for a Writ of Certiorari presents no valid reason for the exercise of this Court's discretion to review the decision below.

ISSUES ON APPEAL

1. Whether three judgments of the highest state court, holding that a school district was properly dissolved pursuant to a valid state statute, bar a subsequent attempt to challenge the validity of the dissolution in Federal Court.

2. Whether the petitioners, (taxpayers within a village, and students and former students within its school system), were in privity with their elected school board so as to have their action barred by *res judicata*.

CONSTITUTION AND STATUTES INVOLVED

In 1965, the Ohio Legislature enacted Ohio Revised Code § 3311.29 which is reproduced in the Respondent's Appendix (RA 40).

Although petitioners characterize this as a Fourteenth Amendment case, it is, in substance, an appeal of the Ohio Supreme Court's interpretation of Ohio law.

Only local, nonfederal issues are asserted here.

STATEMENT OF THE CASE

On August 14, 1979, the petitioners filed this action in the District Court seeking to enjoin the 1968 State-ordered dissolution of the Bratenahl school system, and its merger into the Cleveland system. Initially, they moved to have the case designated as related to *Reed v. Rhodes,* 455 F. Supp. 546 (N.D. Ohio, 1978). That motion was denied on the holding that the complaint dealt solely with state law issues. (RA 1).

On August 23, 1979, petitioners filed an amended complaint adding allegations that the State and Cleveland Boards had conspired to deprive them of their federal and state constitutional and statutory rights. The amended complaint also added new party plaintiffs without leave of court, contrary to Federal Civil Rule 15(a). Respondent filed a motion to dismiss, or in the alternative, a motion for summary judgment.

After oral argument on the motion, the District Court dismissed the state law claims as barred by the doctrine of *res judicata,* and rendered summary judgment on the conspiracy allegations. (A 15, 20).

After the District Court denied an oral application for a stay of judgment pending appeal, petitioners applied to a single Circuit Judge. The Circuit Judge denied the stay, emphasizing that the validity of the 1968 State Board resolution had been presented to the Supreme Court of Ohio on multiple occasions, and that *certiorari* had been denied by this Court. (RA - 3).

Following the denial of an appellate stay, the merger of Bratenahl into the Cleveland District was physically accomplished. Title to the physical assets of the former Bratenahl District was transferred to Cleveland. Cleveland's payrolls and property tax records were amended to include Bratenahl. A motion to close the Bratenahl schools and reassign the students to other Cleveland schools is pending in the District Court in *Reed v. Rhodes, supra.*

The Sixth Circuit, on expedited appeal, affirmed the judgment below, recognizing that the Federal litigation was merely "a further effort to achieve that which failed of achievement in the Ohio courts", *Wilt v. State Board* of Education, 608 F. 2d 1126, 1127 (6th Cir., 1979). (A 2). A Petition for Rehearing was denied on November 28, 1979. (A 1).

REASONS FOR DENIAL OF THE WRIT

I. THE SUBJECT MATTER OF THIS CAUSE HAS THRICE BEEN PRESENTED TO THE OHIO SUPREME COURT AND ONCE TO THIS COURT

For nine years prior to the filing of this action, Bratenahl litigated the validity of the 1968 State Board Order of dissolution and merger, and subsequent refusals to rescind it, throughout the state courts of Ohio. The first eight years of litigation culminated with the decision of the Ohio Supreme Court in *State ex rel Bratenahl Local School District v. State Board of Education,* 53 Ohio St. 2d, 173 (1978), *cert. den.* 439 U.S. 865 (1978) *(Bratenahl I).* (A 69, RA 39). The question of the validity of the 1968 order was fully briefed and argued; the Ohio Supreme Court considered the merits and held:

> This court concludes that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the state Board. 53 Ohio St. 2d at 178.

Bratenahl's Petition for Certiorari raised due process questions identical to those raised in this cause, (RA 36). This Court denied an application for a stay (RA 34-35), and a petition for a *writ of certiorari.* (RA 39).

Two days after denial of the writ, Bratenahl filed a complaint in prohibition and mandamus seeking to stop the dissolution; after the state Court of Appeals unanimously dismissed that action, Bratenahl appealed to the Ohio Supreme Court. The Ohio Supreme Court dispelled

any contention that the *Bratenahl I* approval of the 1970 dissolution could have been dictum in a concise *per curiam* opinion. *State ex rel Board of Education, Bratenahl Local School District v. State Board of Education,* 58 Ohio St. 2d 189, 192 (1979) *(Bratenahl II).* (A 39).

Under Ohio law, a *per curiam* opinion represents the pronouncement of law and judgment of the Court. *State ex rel Canada v. Phillips,* 168 Ohio St. 191 (1958) (Syll. 6).

The Ohio Supreme Court's judgment in *Bratenahl II* regarded the *Bratenahl I* approval of the 1970 dissolution as a judgment on the merits, and accorded it *res judicata* effect. The *Bratenahl II* Court stated:

> [T]his court in [*Bratenahl I*], . . . quite properly concluded that the school district was dissolved as of July 1, 1970 . . . *State ex rel Board of Education Bratenahl Local School District v. State Board of Education,* 58 Ohio St. 2d 189, 192 (1979) (*Bratenahl II*). (A 82).

Subsequently, the judgments in *Bratenahl I* and *II* have been held to bar an action by a taxpayer, resident, and elector of Bratenahl on behalf of himself and all others similarly situated. *Stromberg v. Board of Education,* No. 41011 (Cuyahoga County Court of Appeals, 1979), *appeal docketed,* No. 80-126 (Ohio S. Ct., January 28, 1980). (RA 28, 31). Bratenahl, a defendant in *Stromberg,* cross-claimed and sought an injunction against the dissolution and merger. Bratenahl did not join in the taxpayer's appeal from the dismissal of the action, choosing instead to initiate this action in the District Court.

On dismissing the taxpayer's action, the Court of Appeals of Ohio premised its application of *res judicata* on the Ohio Supreme Court's enunciation of the privity requirement in *City of Cincinnati ex rel Crotty v. Cincinnati,* 50 Ohio St. 2d 27, 28 (1977):

> It is a generally accepted rule that in absence of fraud or collusion, a judgment for or against a governmen-

> tal body, such as a municipal corporation, is binding and conclusive as *res judicata* on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest except where the proceedings were not of an adversary character.

As recently as five (5) days ago, the validity of the original State order of dissolution of Bratenahl and its merger into the Cleveland system was before the Ohio Supreme Court for a third time.

In *Wiss v. Cuyahoga County Board of Elections,* 61 Ohio St. 2d 298, (1980) (decided March 12, 1980 and published in OHIO BAR, Vol. LIII, No. 11, March 17, 1980), a unanimous Ohio Supreme Court reaffirmed the vitality of its judgments in Bratenahl I and II. It explicitly rejected the same arguments being advanced here in the Petition for Certiorari.

Wiss, another Bratenahl resident, had sought a writ of mandamus ordering the Board of Elections to place his name on the ballot as a candidate for the county school board, representing the dissolved Bratenahl school district. The Ohio Court of Appeals had granted the writ and ordered that the certification of the election results be withheld until the status of the Bratenahl schools had been adjudicated. The Ohio Supreme Court unanimously reversed that judgment and held, in a *per curiam* opinion, that Bratenahl I and II had disposed of the issue of Bratenahl's existence:

> A review of these cases shows that the status of the Bratenahl School District has been established and the same was dissolved on July 1, 1970, and the issue is *res judicata. Wiss, supra.* (RA 42).

The Ohio Supreme Court then reiterated its "syllabus rule" which is erroneously questioned by Petitioners herein (see Petition, 8-9):

> Appellee argues (correctly) that the law of a Supreme Court case is stated in the syllabus thereto and concludes (incorrectly) that since the quoted language is not in the syllabus, it is of no effect. The syllabus of a case must be read in light of facts in the case. In *Bratenahl I, supra,* the determination that the Bratenahl School District had been dissolved in 1970 was a *sine qua non* under-pinning to the court's syllabus. Should there be any question concerning whether the court arrived at such a determination, it was dispelled by this court's blunt statement in Bratenahl II, at page 190. *Wiss, supra.* (RA 42).

Review should be denied here because the petitioners seek to accomplish in the Federal Courts what their representative, Bratenahl, and another taxpayer, Stromberg, failed to accomplish in the state courts. Claims which were fully litigated in the state courts cannot be relitigated in a federal forum. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 419 (1964); *Angel v. Bullington,* 330 U.S. 183,192 (1974). This Court has emphasized the deleterious effect of permitting a litigant to ignore an adverse decision in a state court and start anew in the District Court:

> Such a rule would not only countenance an unnecessary increase in the length and cost of litigation, it would also be a potential source of friction between the state and federal judiciaries", *England, supra.,* 375 U.S. at 419.

II. THE COURT BELOW CORRECTLY APPLIED THE DOCTRINE OF RES JUDICATA

Under the doctrine of *res judicata,* a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action, *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 (n.5) (1979).

The Circuit Judge below observed, in ruling on petitioners' motion for a stay, that the primary thrust of the amended complaint was:

> [T]o prevent defendant – appellees from dissolving and merging the Bratenahl City School District into the Cleveland City School District alleging violation of rights guaranteed by the Federal Constitution and *Laws*. (RA 2-3).

With the exception of the conspiracy allegation, all matters raised below were previously adjudicated by the state courts. The conspiracy claim could have been presented in the prior litigation and was therefore barred. *Partmar Corporation v. Paramount Theatres Corporation*, 347 U.S. 89, 90-91 (1954); *State ex rel Ohio Water Services v. Mahoning Valley Sanitary District*, 169 Ohio St. 31, 34 (1959).

The requirement of privity is met when the parties are in substance the same, regardless of whether they are nominally different. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402 (1940). The Bratenahl Board of Education (plaintiff, in the state court actions, and a petitioner herein as well) was the elected representative of the petitioners who are Bratenahl taxpayers, students currently enrolled in the schools in Bratenahl, and former Bratenahl students.

The interests of Bratenahl and the other petitioners coincide. Their common goal was to maintain their school system as an independent entity, contrary to Ohio law. Bratenahl capably represented the petitioners' interests in nine years of litigation. Their claims were rejected on the merits, twice by the Ohio Supreme Court, and once by this Court on a Petition for Writ of Certiorari. The Ohio courts have similarly rejected another taxpayer's claim of constitutional violations. *Stromberg, supra*. Within the last week, the Ohio Supreme Court rejected these claims for a third time, *Wiss, supra*.

The time has come when this litigation must end. The opinion of this Court in *Baldwin v. Iowa State Travelling Men's Association*, 283 U.S. 525, 526 (1931) is particularly compelling, given the ten year history of this cause:

> "Public policy dictates that there should be an end of litigation; that those who have presented an issue should be bound by the result of the contest, and that matters once tried should be considered forever settled as between the parties."

III. NO NEW SUBSTANTIAL CONSTITUTIONAL QUESTION HAS BEEN RAISED

The petitioners have raised no new, substantial constitutional question justifying review. The statutory, factual, and constitutional attacks of a decade were thrice heard and rejected by the Supreme Court of Ohio. The 1973 declaratory judgment of a lower appellate court has clearly been overruled and nullified by the judgments in *Bratenahl I* and *II, supra*, and in *Wiss, supra*.

The supposed constitutional issue is non-existent. When stripped to its bare essentials, it is simply a matter of the application and affirmance of the doctrine of *res judicata*.

Had there been a constitutional violation, it would have been discovered and remedied by this Court when it considered Bratenahl's petition for *certiorari* two years ago in *Bratenahl I*.

However, when *certiorari* was denied, the issue was settled.

CONCLUSION

The Courts below, in applying *res judicata*, recognized that this action constituted an attempt to accomplish, in the Federal Courts, that which failed of achievement in a decade of state court litigation.

A taxpayer's suit such as this does not permit parties to relitigate that which their privies had previously brought before the Courts.

There is no constitutional justification for re-examination on the merits at this late date. The public interest was fulfilled years ago with the conclusion of *Bratenahl I*. Today, that interest is simply the conclusion of the final chapter of Bratenahl.

The writ must be denied so that this litigation may finally come to an end.

Respectfully submitted,

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March 17, 1980.

Supreme Court, U.S.
FILED
MAR 31 1980
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SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1288

ETHAN WILT and HEATHER WILT, TEREASA RACINSKAS and ADAM RACINSKAS, CHRISTOPHER BOEMAN and THOMAS BOEMAN, KATHLEEN TOKE, SHAWN MACK and ANDREA MACK, REGINA HARRIS, DEJONA CEASOR, CORA OWENS, TIMOTHY J. COSGROVE, DANIEL WILT and PEGGY WILT, BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,

Petitioners,

vs.

STATE BOARD OF EDUCATION, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, SUPERINTENDENT OF PUBLIC INSTRUCTION, BOARD OF EDUCATION, CLEVELAND CITY SCHOOL DISTRICT, VINCENT C. CAMPANELLA, AUDITOR OF CUYAHOGA COUNTY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(B) Whether this controversy is justiciable since the State Supreme Court has repeatedly held that the local school district was dissolved effective July 1, 1970, and the dissolution of the local school district and merger of the local school district have already taken place 2

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B. This controversy is no longer justiciable since the Ohio State Supreme Court has repeatedly held that the Bratenahl School District was dissolved effective July 1, 1970, and, pursuant to such judgments, the dissolution and merger of the school district have already taken place 11

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. QUESTIONS PRESENTED

(A) Did the Court of Appeals for the Sixth Circuit and the District Court for the Northern District of Ohio properly abide by two judgments of the State Supreme Court and properly apply the doctrine of *res judicata* where the issues attempted to be raised by the petitioners

had the opportunity to be raised during nine years of litigation in the State courts and the United States Supreme Court.

(B) Whether this controversy is justiciable since the State Supreme Court has repeatedly held that the local school district was dissolved effective July 1, 1970, and the dissolution of the local school district and merger of the local school district have already taken place.

II. STATEMENT OF THE CASE

Petitioners in this action are seeking injunctive relief to prevent the advancement of the merger of the Bratenahl Local School District into the Cleveland City School district.

The history of this controversy is succinctly set forth in the Opinion of the Sixth Circuit Court of Appeals (Petitioners' A2-4). In 1967 the Ohio legislature enacted a law requiring the dissolution and merger of any school district which did not maintain grades 1 through 12 (A2). Because the Bratenahl Local School District did not maintain the requisite 12 grades, the Petitioner Bratenahl Board of Education entered into an agreement with the Respondent State Board of Education — evidenced by a written resolution of the Bratenahl Board of Education and a written order of the State Board of Education in June, 1968 — that the Bratenahl School District would merge with the Cleveland School District effective July 1, 1970 (A3).

Following expiration of this two-year grace period for the merger, Petitioner Bratenahl Board of Education initiated litigation to attempt to rescind its agreement and nullify the 1968 order of Respondent State Board of Education (A3-4).

A. Bratenahl I

Eight years of litigation of the dispute over the merger culminated in the judgment of the Ohio Supreme Court in *State, ex rel. Board of Education of Bratenahl Local School District* v. *State Board of Education,* 53 Ohio St. 2d 173, 373 N.E. 2d 1238, *cert. den.* 439 U.S. 865 (1978) [*Bratenahl I*]. The entire history and record of this controversy was before the Supreme Court at this time, as demonstrated by both the majority and dissenting opinions (A70-72; A75-78). Indeed, the judgments from three separate actions initiated by the Bratenahl Board of Education were consolidated for review by the Ohio Supreme Court (A71-72). The Court considered the 1968 order of merger by the State Board of Education and the uncontroverted fact that this 1968 order was agreed upon and not appealed by any party. It thus determined as follows:

> "This Court concludes that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the State board."
>
> (A75)

Following this judgment, Petitioner Bratenahl Board sought a stay of the judgment from the United States Supreme Court. Both Justice Potter Stewart and the full Court of the Supreme Court of the United States denied the application filed by Petitioner Bratenahl Board for stay of execution of the judgment of the Supreme Court of Ohio (Respondents' Joint A34-35), and also subsequently denied Petitioner Bratenahl Board's petition for a writ of certiorari (RJA39). This petition involved the same controversy of the merger of the Bratenahl Local School District and raised the same issue of the 1973 declaratory judgment rendered by the State Court of Appeals which are presented by the instant Petition filed by the Bratenahl Board (RJA36-38).

B. Bratenahl II

Dissatisfied with the judgment rendered by the Ohio Supreme Court in *Bratenahl I,* the Petitioner Bratenahl Board of Education quickly initiated a new action in the State Court of Appeals again challenging the validity of the dissolution. The State Court of Appeals *sua sponte,* determined that the complaint failed to state a claim upon which relief could be granted because the issues sought to be raised were barred by the Ohio Supreme Court's judgment in *Bratenahl I* and the doctrine of *res judicata* (A79, 81).

Petitioner Bratenahl Board of Education appealed this judgment to the Ohio Supreme Court and in a unanimous, *per curiam* opinion the Court determined that the matter was *res judicata* and again stated:

> "The decision of this Court, on March 22, 1978, in *State, ex rel. Bd. of Edn., supra,* held that the 1970 refusal of the state board to grant an extension was not 'appealable,' and that the school district was properly dissolved on July 1, 1970." *State ex rel. Board of Education* v. *State Board of Education,* 58 Ohio St. 2d 189 (1979) [*Bratenahl II*].
>
> (A81)

Thus, in *Bratenahl II,* the Ohio Supreme Court interpreted its own opinion in *Bratenahl I* and plainly reaffirmed that the Bratenahl School District was properly dissolved on July 1, 1970, yet in the instant Petition it is feebly argued that the Ohio Supreme Court did not so hold (Petition 4).

C. The Stromberg Class Action — Bratenahl III

This class action was brought in 1978 in the State Court of Common Pleas on behalf of the residents, taxpayers and electors of the Village of Bratenahl, Ohio, claiming that the merger of the school districts pursuant to the 1968 order of the State Board is in violation of the Constitutions of the United States and State of Ohio (RJA4-10). The State Court of Common Pleas sustained motions to dismiss the action on the ground that the issues attempted to be asserted therein were barred by the judgments of the Supreme Court of Ohio in *Bratenahl I* and *Bratenahl II* and the doctrine of *res judicata,* since the issues "were or could have been considered in the related litigation between substantially the same parties." (RJA17-18).

On appeal, the judgment of the lower court was affirmed by the State Court of Appeals with the Court concluding that "the trial court properly dismissed appellant's taxpayer suit on the basis of the doctrine of *res judicata.*" (RJA28-31). Presently, a motion to certify the record to hear the appeal is pending before the Ohio Supreme Court (RJA32-33).

D. Federal Court Action — Bratenahl IV

The instant action was filed in 1979 in the District Court for the Northern District of Ohio by the same Bratenahl Board of Education and 12 individuals who are either Bratenahl taxpayers, students enrolled in schools in Bratenahl or former students from schools in Bratenahl (A4-5), claiming violations of alleged state constitutional and statutory rights and alleged federal constitutional and statutory rights (A5-6).

All of the alleged constitutional issues concerned events that had previously been the subject of litigation in the

nine year history of litigation between the Bratenahl Board of Education and the State Board of Education.

Following submission of briefs of the parties, affidavits, and an oral hearing, the District Court outlined the prior extensive litigation and granted Respondents' motions to dismiss all of the claims except the conspiracy claim by reason of the doctrines of *res judicata* and collateral estoppel (A9-16). The Court's determination that the conspiracy claim failed to state a claim upon which relief can be granted (A18) has not been presented by Petitioners as a question for review.

On appeal, the Sixth Circuit Court of Appeals affirmed the judgment of the District Court and held as follows:

> "Upon consideration, this court fully agrees with Judge Manos that the extensive record of litigation in the Ohio State Courts is fully and completely dispositive of all claims made by the plaintiffs in the federal case except that of conspiracy. Plaintiffs may not simply re-litigate state issues under the guise of alleged and unsupported violations of federal constitutional rights."
>
> (A6-7)

Petitioners seek the United States Supreme Court to review this judgment affirming dismissal of the amended complaint because the Court determined that the claims therein were barred by the doctrine of *res judicata* (except for the conspiracy claim which was dismissed for failure to state a claim upon which relief can be granted).

III. REASONS FOR DENYING THE WRIT OF CERTIORARI

The judgment of the Court of Appeals for the Sixth Circuit should not be reviewed because:

A. The judgment properly followed the prior judgments rendered by the State Supreme Court holding that the Bratenahl School District was properly dissolved on July 1, 1970, and properly applied the doctrine of *res judicata* to bar the claims raised by the petitioners where the claims were presented or had an opportunity to be presented during the nine years of litigation in the State courts and the United States Supreme Court.

B. This controversy is no longer justiciable since the Ohio State Supreme Court has repeatedly held that the Bratenahl School District was dissolved effective July 1, 1970, and, pursuant to such judgments, the dissolution and merger of the school district have already taken place.

Therefore, because of the obvious absence of any special and important reasons for this Court to review this case, Petitioners' request for a Writ of Certiorari should be denied.

A. The Judgment Properly Followed the Prior Judgments Rendered by the State Supreme Court Holding that the Bratenahl School District was Properly dissolved on July 1, 1970, and Properly Applied the Doctrine of Res Judicata to Bar the Claims Raised by the Petitioners Where the Claims Were Presented or Had an Opportunity to be Presented During the Nine Years of Litigation in the State Courts and the United States Supreme Court.

In their statement of the case, Petitioners argue that the Supreme Court of Ohio did not hold that on July 1, 1970, the Bratenahl School District was properly dissolved and that "Had the Supreme Court of Ohio so held, this case would not be here" (Petition 4). To make this argument, Petitioners defy three decisions of the Ohio Supreme Court where the Court squarely held that the school district was dissolved:

1. In *Bratenahl I* the Court held that:

> "This Court concludes that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the State Board."
>
> (A75)

2. In *Bratenahl II* the Court, in a *per curiam* opinion, held that:

> "The decision of this Court, on March 22, 1978, in *State, ex rel. Bd. of Edn., supra,* held that the 1970 refusal of the state board to grant an extension was not 'appealable,' and that the school district was properly dissolved on July 1, 1970."
>
> (A81)

3. In *Wiss* v. *Cuyahoga Board of Elections,* 61 Ohio St. 2d 298 (1980), the Court, in a *per curiam* opinion, very

recently addressed precisely the same argument presented by Petitioners and determined:

> "The status of the Bratenahl Local School District has been the subject of extensive litigation, some continuing. *State, ex rel. Bd. of Edn.* v. *State Bd. of Edn.* (1978), 53 Ohio St. 2d 173, certiorari denied, 439 U.S. 865 (*Bratenahl I*); *State, ex rel. Bd. of Edn.* v. *State Bd. of Edn.,* (1979), 58 Ohio St. 2d 189 (*Bratenahl II*); *Wilt* v. *State Bd. of Edn.* (C.A. 6, 1979), 608 F. 2d 1126; *Stromberg* v. *Bd. of Edn.,* Cuyahoga County Ct. of App., Case No. 41011, pending.
>
> A review of these cases shows that the status of the Bratenahl School District has been established and the same was dissolved on July 1, 1970, and the issue is *res judicata.*

In *Bratenahl I, supra,* the court stated at page 178:

> '. . . This court concludes that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the state board.'

Appellee argues (*correctly*) that the law of a Supreme Court case is stated in the syllabus thereto and concludes (*incorrectly*) that since the quoted language is not in the syllabus it is of no effect. The syllabus of a case must be read in light of facts in the case. In *Bratenahl I, supra,* the determination that the Bratenahl School District had been dissolved in 1970 was a *sine qua non* underpinning to the court's syllabus. Should there be any question concerning whether this court arrived at such a determination, it was dispelled by this court's blunt statement in *Bratenahl II, supra,* at page 190:

> 'The decision of this court, on March 22, 1978, in *State, ex rel. Bd. of Edn., supra* (*Bratenahl I, supra*), held that the 1970 refusal of the state board to grant an extension was not 'appealable,' and that the school district was properly dissolved on July 1, 1970.'

In *Wilt* v. *Bd. of Edn., supra,* the federal circuit court also found this issue to be *res judicata.*"

(Supplementary App. pp. 13-17)

Thus, the Ohio Supreme Court itself has expressly and flatly rejected Petitioners' argument concerning the interpretation of the Ohio Supreme Court's syllabus in *Bratenahl I* and its opinions in *Bratenahl I* and *Bratenahl II.* The Ohio Supreme Court's decision in *Wiss, supra,* quoted above, leaves no doubt that the judgment of the Sixth Circuit Court of Appeals in the instant case was absolutely, legally correct in following the judgments rendered by the Ohio Supreme Court in *Bratenahl I* and *Bratenahl II.* Further, by Petitioners' own admission that this case would not be here had the Ohio Supreme Court held that the Bratenahl School District was dissolved, it is patently obvious that, indeed, this case should not be here.

Petitioners also attempt to present the argument to this Court that a declaratory judgment in 1973 by a State Court of Appeals should reverse the outcome of this controversy. The fact that this same argument was made by Petitioner Bratenahl Board in *Bratenahl I* and expressly rejected by the majority of the Ohio Supreme Court is evidenced by the dissenting opinion in that case (A77). Petitioner Bratenahl Board then presented this exact same issue in its petition for writ of certiorari filed in this Court in *Bratenahl I,* which petition was overruled (RJA36-39). Thus, on the plain face of the record, this issue is clearly barred by the doctrine of *res judicata.*

B. This Controversy Is No Longer Justiciable Since the Ohio State Supreme Court Has Repeatedly Held that the Bratenahl School District Was Dissolved Effective July 1, 1970, and, Pursuant to Such Judgments, the Dissolution and Merger of the School District Have Already Taken Place.

By reasons of the Ohio Supreme Court's judgments in *Bratenahl I, Bratenahl II* and *Wiss,* this controversy is moot.

In *Bratenahl II,* the Ohio Supreme Court determined that proceedings after 1970 to determine the validity of the dissolution and merger of the Bratenahl School District are moot since the Ohio Supreme Court in *Bratenahl I* "quite properly concluded that the school district was dissolved as of July 1, 1970, pursuant to the unappealed and agreed upon 1968 order" (A82).

By reason of the *Bratenahl II* decision, the District Court properly noted that several of the claims presented by the instant amended complaint are moot, including the claims relating to the 1973 declaratory judgment (A13-15).

Moreover, inasmuch as the dissolution and merger *have been consummated* prior to the commencement of the 1979-80 school term (Supplementary App. pp. 17-18), it is obvious that petitioners' claims for injunctive relief are moot. *Wingert* v. *First National Bank of Hagerstown,* 223 U.S. 670 (1912); *Jones* v. *Montague,* 194 U.S. 147 (1904).

IV. CONCLUSION

The unanimous judgment by the Court of Appeals for the Sixth Circuit represents a well-reasoned, legally correct decision which is wholly consistent with the prior judgments of the Ohio Supreme Court relating to the dissolution and merger of a school district pursuant to a state statute – a purely local, nonfederal matter. Because this case contains no special and important issues which would make it appropriate for review and consideration by this Court and because this Court has previously overruled a petition for writ of certiorari involving the same controversy and issues, the instant Writ of Certiorari should be denied.

Respectfully submitted,

JOHN D. HOLSCHUH
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Counsel for Respondents State Board of Education, Department of Education of Ohio, Franklin B. Walter, Superintendent of Public Instruction

SUPPLEMENTARY APPENDIX

WISS, APPELLEE *v.*
CUYAHOGA COUNTY BOARD OF ELECTIONS, APPELLANT.

[Cite as Wiss v. Bd. of Elections (1980)],
61 Ohio St. 2d 298.]

Mandamus—Elections—To compel restoration of candidate's name to ballot—Properly denied, when—Nominating petition invalid.

(No. 79-1476—Decided March 12, 1980.)

APPEAL from the Court of Appeals for Cuyahoga County.

On November 2, 1979, R. Garin Wiss, appellee herein, initiated an original action in mandamus in the Court of Appeals, seeking an order requiring the Cuyahoga County Board of Elections to restore his name to the ballot as a candidate for the Cuyahoga County Board of Education at the November 6, 1979, general election. The board had determined that the appellee's nominating petition was invalid and had removed his name from the ballot for the reason that, as a resident of the village of Bratenahl, appellee would be ineligible to serve as a member of the county board of education if elected.

On November 5, 1979, the Court of Appeals granted the writ of mandamus and ordered the board of elections to place appellee's name on the ballot as a candidate for the Cuayhgoa County. Board of Education at the November 6, 1979, election. The board of elections was further ordered to count the votes cast for such office, but to withhold certification of the results until the status of the Bratenahl Local School District had been adjudicated.

The cause is now before this court upon an appeal as of right.

Messrs. Wegman, Hessler & Vanderburg and *Mr. Daniel D. Wilt,* for appellee.

Mr. John T. Corrigan, prosecuting attorney, and *Mr. David A. Williamson,* for appellant.

Per Curiam. As a resident and elector of the village of Bratenahl, appellee would be ineligible to be a member of the Cuyahoga County Board of Education under R. C. 3311.05 and 3311.052 *if* the Bratenahl Local School District has been dissolved and its territory merged with that of the Cleveland City School District.

The questions before the court are then: (1) Has the Bratenahl Local School District been dissolved; and, (2) if so, did the board of elections properly rule appellee's nominating petition invalid?

I.

The status of the Bratenahl Local School District has been the subject of extensive litigation, some continuing. *State, ex rel. Bd. of Edn.* v. *State Bd. of Edn.* (1978), 53 Ohio St. 2d 173, certiorari denied, 439 U.S. 865 (*Bratenahl I*); *State, ex rel. Bd. of Edn.* v. *State Bd. of Edn.* (1979), 58 Ohio St. 2d 189 (*Bratenahl II*); *Wilt* v. *State Bd. of Edn.* (C.A. 6, 1979), 608 F. 2d 1126; *Stromberg* v. *Bd. of Edn.,* Cuyahoga County Ct. of App., Case No. 41011, pending.

A review of these cases shows that the status of the Bratenahl School District has been established and the same was dissolved on July 1, 1970, and the issues is *res judicata.*

In *Bratenahl I, supra,* the court stated at page 178:

"* * * This court concludes that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the state board."

Appellee argues (correctly) that the law of a Supreme Court case is stated in the syllabus thereto and concludes (incorrectly) that since the quoted language is not in the syllabus, it is of no effect. The syllabus of a case must be read in light of facts in the case. In *Bratenahl I, supra,* the determination that the Bratenahl School District had been dissolved in 1970 was a *sine qua non* underpinning to the court's syllabus. Should there be any question concerning whether this court arrived at such a determination, it was dispelled by this court's blunt statement in *Bratenahl II, supra,* at page 190:

"The decision of this court, on March 22, 1978, in *State, ex rel. Bd. of Edn., supra* [*Bratenahl I, supra*], held that the 1970 refusal of the state board to grant an extension was not 'appealable,' and that the school district was properly dissolved on July 1, 1970."

In *Wilt* v. *Bd. of Edn., supra,* the federal circuit court also found this issue to be *res judicata.*

Appellee insists that the Bratenahl controversy is still alive because the constitutionality of R. C. 3311.29, the statute empowering the state board to dissolve the Bratenahl School District, is under attack in *Stromberg, supra,* a case pending in the Cuyahoga County Court of Appeals.

This rationale for qualifying the Bratenahl issue as viable is tenuous at best. An allegation of unconstitutionality of a statute in a case pending in a lower court is not justification for overturning a determination twice made by this court.

II.

R. C. 3311.052 requires that members of a county board of education are to be elected "* * * from the qualified electors *residing in the county school district territory,*" and "county school district" is defined in R. C. 3311.05, in part, as "[t]he territory within the territorial limits of a county, *exclusive of the territory embraced in any city school district* * * *." (Emphasis added).

Appellee has stated in his complaint that he is a "* * * qualified elector of the Village of Bratenahl, Ohio." Therefore, since the Bratenahl School District has been dissolved and its former territory merged with the Cleveland City School District, appellee is ineligible to serve on the Cuyahoga County Board of Education.

In this case, the board of elections, *sua sponte,* reviewed the sufficiency of appellee's petition papers and found them wanting due to appellee's residence outside the territorial area of the office to which he sought election. Such spontaneous action by a board without a prior protest has been recognized by this court in *State, ex rel. McGinley* v. *Bliss* (1948), 149 Ohio St. 329. This action by the board is authorized by the broad grant of power vested in it by R. C. 3501.11 which states:

> "Each board of elections * * * shall:
> "* * *
> "(K) Review, examine, and certify the sufficiency and validity of petitions and nomination papers."

There is no requirement of notice and hearing in R. C. 3501.11 (K) and this court has refused to read one into it. *McGinley, supra.*

Absent any allegation of fraud, it would seem incongruous to give a board of elections power to review nominating

petitions without also giving it the right to disqualify a potential nominee when, on its face, his nominating petition indicates his ineligibility for the office that he seeks.

Accordingly the judgment of the Court of Appeals is reversed, and the writ of mandamus is denied.

Judgment reversed.

CELEBREZZE, C. J., HERBERT, W. BROWN, P. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

Affidavit of Michael J. Hoffman, Treasurer of Cleveland City School District, filed in support of defendants' motions to dismiss in Case No. C79-1579, Wilt v. State Board, N.D. Ohio

STATE OF OHIO :
: SS
COUNTY OF CUYAHOGA :

AFFIDAVIT

Before me, a Notary Public, in and for said County, personally appeared MICHAEL J. HOFFMANN, who after being first duly sworn, deposes and says that he has personal knowledge of all of the events described herein.

Affiant further says that he is the Treasurer of Cleveland City School District, having been duly elected to that position by the Board of Education of the Cleveland City School District pursuant to § 3313.22 of the Ohio Revised Code,

Affiant further says that as Treasurer, he is responsible for keeping an account of all the fiscal affairs of the District.

Affiant further says that on September 4, 1979, all tax revenues previously held in escrow pursuant to court order by the Auditor of Cuyahoga County, consisting of Two Hundred Eighty Two Thousand Seven Hundred Twenty Three Dollars ($282,723.00), was transferred to the Board of Education of the Cleveland City School District.

Affiant further says that all real property, owned by the former Bratenahl Local School District was transferred by the Auditor of Cuyahoga County to the Board of Education of the Cleveland City School District on September 4, 1979 and is being recorded by the County Recorder.

Affiant further says that the school bus owned by the former Bratenahl Local School District was transferred to the Board of Education of the Cleveland City School District on September 5, 1979 by a certificate of title issued in Cleveland's name by the Cuyahoga County Clerk of Court.

Affiant further says that he is informed that all further property tax revenues collected in the Village of Bratenahl for school purposes will be dispensed to the Board of Education of the Cleveland City School District.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ MICHAEL J. HOFFMANN

[DULY NOTARIZED]

Supreme Court, U.S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1288

ETHAN WILT, et. al.,

Petitioners

— vs —

STATE BOARD OF EDUCATION, et. al.,

Respondents.

RESPONDENTS' JOINT APPENDIX TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

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1. Order entered by Chief Judge Frank J. Battisti, August 15, 1979 in *Wilt v. State Board of Education.*	RA1
2. Order entered by Circuit Judge Anthony Celebrezze, August 31, 1979 denying stay pending appeal in *Wilt v. State Board of Education.*	RA2
3. Complaint in *Stromberg v. Board of Education, et al.*, Case No. 78-987399 in Common Pleas Court of Cuyahoga County, Ohio.	RA4
4. Amended Complaint in *Stromberg v. Board of Education, et al.*, Case No. 78-987399, Common Pleas Court of Cuyahoga County, Ohio.	RA7
5. Motion of State Board of Education to Dismiss in *Stromberg v. Board of Education, et al.*, Case No. 78-987399, Common Pleas Court of Cuyahoga County, Ohio.	RA11
6. Motion of State Board of Education to Dismiss Cross-Claim in *Stromberg v. Board of Education, et al.*, Case No. 78-987399, Common Pleas Court of Cuyahoga County, Ohio.	RA12
7. Motion of Cleveland Board of Education to Dismiss in *Stromberg v. Board of Education, et al.*, Case No. 78-987399, Common Pleas Court of Cuyahoga County, Ohio.	RA15
8. Order and Judgment of Judge Richard M. Markus in the *Stromberg* case rendered on May 31, 1979.	RA17
9. Order of Judge Richard M. Markus in the *Stromberg* case dated June 22, 1979.	RA19

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10. Notice of Appeal filed June 27, 1979, in *Stromberg v. Board of Education, et al.*, Case No. 987399, Court of Common Pleas, Cuyahoga County, Ohio. RA21

11. Decision and Journal Entry of Court of Appeals in Case No. 41011 denying Stromberg's Motion to Stay Proceedings, dated August 14, 1979. ..... RA22

12. Decision and Opinion of Court of Appeals in Case No. 41011, affirming judgment of Court of Common Pleas. RA28

13. Propositions of Law set forth in Memorandum in Support of Jurisdiction in *Stromberg* filed in the Supreme Court of Ohio, Case No. 80-126, January 29, 1980. ..... RA32

14. Notices of the Clerk of the Supreme Court of the United States regarding denials of stay of execution of the judgment of the Supreme Court of Ohio, dated June 20 and June 26, 1978 (*Bratenahl I*). RA34

15. Table of Contents and Petition for Writ of Certiorari filed in U.S. Supreme Court on August 1, 1978, by Bratenahl Board of Education (*Bratenahl I*). RA36

16. Notice of the Clerk of the Supreme Court of the United States regarding denial of Bratenahl's petition for a writ of certiorari, dated October 2, 1978 (*Bratenahl I*). RA39

17. Ohio Revised Code 3311.29 (Eff. 12-1-67). RA40

18. Ohio Revised Code 3311.29 (Eff. 9-30-75). RA41

19. *Wiss v. Cuyahoga County Board of Elections*, 61 Ohio St. 2d — (1980) (published Ohio Bar, Vol. LIII, No. 11, March 17, 1980). RA42

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ETHAN WILT, et al., *Plaintiff*	)	
— vs —	)	C79-1579
STATE BOARD OF EDUCATION, et al., *Defendants*	)	**ORDER**
Battisti, C.J.	)	

Plaintiffs have filed this complaint as a case related to *Reed v. Rhodes*, Case No. C73-1300. The plaintiffs' complaint presents the issues of the disbursement of monies raised for the use and benefit of the Bratenahl Local School District and the transfer of properties listed in the name of the Bratenahl Local School District to the Cleveland City School District. These issues are related to the general dissolution of the Bratenahl Local School District. In contrast, *Reed v. Rhodes*, concerns the violation of the Equal Protection Clause by the Cleveland City School District. For this reason, plaintiffs' complaint is not related to *Reed v. Rhodes*, and shall be assigned by Clerk of Court according to random draw. It should be noted that the reassignment of students from the Bratenahl Local School District to the Cleveland City School District and the use of Bratenahl Local School District properties by the Cleveland City School District would be matters related to *Reed v. Rhodes*, but are not raised in this complaint.

IT IS SO ORDERED.

FRANK J. BATTISTI
Chief Judge

Dated:
August 15, 1979

No. 79-3580

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ETHAN WILT, et al.,
Plaintiffs, Appellants,

v.

CLEVELAND BOARD OF EDUCATION, et al.,
Defendants - Appellees.

ORDER

Plaintiffs-appellants by their counsel, appeared before the undersigned in Court Room No. 135 of the U. S. District Court for the Northern Division of Ohio at 2:00 p.m., and pursuant to Rule 8, Federal Rules of Appellate Procedure, presented their motion with supporting memorandum and argument for a stay pending appeal to this Court of a formal order of the United States District Court for the Northern District of Ohio, entered August 30, 1979 dismissing in part certain of plaintiffs-appellants' claims, and granting defendants-appellees' motion for summary judgment on plaintiffs-appellants' other claims. The District Court further denied plaintiffs-appellants' motion for a stay pending appeal.

The defendants-appellants by their respective counsel appeared in opposition to the stay pending appeal.

Since it was apparent that exceptional circumstances existed which excused filing of said Motion for Stay with the Clerk of the Court for consideration by a panel or division of the Court, Accordingly,

Application was properly made to the undersigned for determination as a single Judge, pursuant to Rule 8(a) Federal Rules of Appellate Procedure.

The primary thrust of plaintiffs-appellants complaint is to prevent defendant-appellees from dissolving and merging the Bratenahl Local School District into the

Cleveland City School District alleging violation of rights guaranteed by the Federal Constitution and Laws.

With the exception of the conspiracy count all other matters raised have been adjudicated by the state courts in protracted litigation since 1970.

Upon consideration of the arguments of the respective counsel and the briefs of the parties, and the reasons stated by Judge John Manos in his opinion rendered August 30, 1979, the undersigned concludes that the same should be denied.

In light of the fact that the Board of Education of the Bratenahl Local School District adopted a resolution on June 8, 1968, that effective July 1, 1970 the Bratenahl Local School District would cease to exist and made part of the Cleveland City School District. And, further this matter having been presented to the Supreme Court of Ohio for various reasons four times, and certiorari having been denied by the U. S. Supreme Court.

While it is not necessary at this juncture to make any final determination of the issues which may ultimately be raised on appeal, I find no probability of appellants - prevailing upon their appeal, and in my judgment the issues are not sufficiently substantial as to warrant granting the stay especially in the face of its denial by the District Judge after hearing.

It is hereby ordered that the motion for stay pending appeal ought to be, and it hereby is, Denied. It is further ordered that the Clerk of Court set this cause for hearing on the merits on or before September 21, 1979.

It is so ORDERED.

ANTHONY J. CELEBREZZE
Circuit Judge

Dated
August, 31, 1979

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIDNEY STROMBERG
324 Corning Drive
Bratenahl, Ohio 44108, on behalf of himself and all others similarly situated.
Plaintiff

- vs -

BOARD OF EDUCATION, VILLAGE OF BRATENAHL, OHIO
11404 Lake Shore Boulevard
Bratenahl, Ohio 44108

and

BOARD OF EDUCATION CITY OF CLEVELAND, OHIO
1380 East 6th Street
Cleveland, Ohio 44114

and

DEPARTMENT OF EDUCATION STATE OF OHIO
65 South Front Street
Columbus, Ohio 43215

and

WILLIAM J. BROWN ATTORNEY GENERAL STATE OF OHIO
17th Floor
30 East Broad Street
Columbus, Ohio 43215
Defendants

Judge

Case No. 78 987399

Complaint
(filed August 14, 1979)

1. Plaintiff is a taxpayer, resident and elector of the Village of Bratenahl, County of Cuyahoga and State of Ohio.

2. Plaintiff brings this class action on behalf of himself and all others similarly situated as residents, taxpayers and electors of the Village of Bratenahl, County of Cuyahoga and State of Ohio.

3. The approximate number of members of this class exceeds 1,000 and is so numerous that joinder of all members is impractical.

4. The questions of law and fact relative to this controversy are common to all members of the class; that Plaintiff's claim is typical to the claim of the class; that Plaintiff will fairly and equitably project the interest of the class.

5. Adjudication as to this Plaintiff would be dispositive of the interest of the other members of this class not parties to this action and the questions of law and fact common to the members of this class predominate any questions affecting individual members and that this class action is the only means available for the fair and efficient adjudication of this controversy.

6. Plaintiff states that the Defendant, the Ohio State Department of Education, under the authority of Section 3311.29 R.C., has issued an order merging the Bratenahl School District with the Cleveland School District; that Section 3311.29 R.C. includes a mandatory directive transferring funds and property of the merging school district to the new school district; that by reason thereof, the transfer order contained in Section 3311.29 R.C. conveys funds and property of the Bratenahl School District to the Defendant, Cleveland School Board, in excess of $1,000,000.00; that Plaintiff and all members of this class, as taxpayers, have an equitable interest in said property and funds, and that said property and funds are held in trust for them by the Defendant, Bratenahl Board of Education.

7. Plaintiff states that Section 3311.29 R.C., providing for the mandatory transfer of property and funds by administrative order of merger from one school district to another is constitutionally repugnant and in violation of the due process clause of the Constitutions of the United States and the State of Ohio.

8. The transfer and conveyance of said funds and property to the Defendant, Cleveland Board of Education, by reason of said order of merger issued by the Defendant, Ohio State Department of Education, will cause Plaintiff and all members of the class to suffer irreparable damage.

WHEREFORE, Plaintiff demands that the Court adjudge:

1. That Section 3311.29 R.C., authorizing the merger of school districts and including the mandatory transfer and conveyance of funds and property by administrative order from one district to another is unconstitutional.

2. That the order and/or orders pending and issued by the Ohio Department of Education under authority of Section 3311.29 R.C. are invalid.

3. That the Defendant, Ohio Department of Education, as well as the Defendant, Cleveland Board of Education and Bratenahl Board of Education, be temporarily restrained and enjoined from enforcing and/or instituting said order of merger, and that said injunctive relief be made permanent upon the final hearing of this cause.

4. That the Court make a determination of the fair and reasonable value of the services rendered by Plaintiff's attorney and that he be granted an order allowing payment of said attorney's fees, together with his costs.

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIDNEY STROMBERG
324 Corning Drive
Bratenahl, Ohio 44108, on behalf of himself and all others similarly situated.
Plaintiff

vs

BOARD OF EDUCATION
VILLAGE OF
BRATENAHL, OHIO
11404 Lake Shore Boulevard
Bratenahl, Ohio 44108

and

BOARD OF EDUCATION
CITY OF CLEVELAND,
OHIO
1380 East 6th Street
Cleveland, Ohio 44114

and

OHIO STATE BOARD OF
EDUCATION
Julie Williams, Clerk
Room 808
65 South Front Street
Columbus, Ohio 43215

and

WILLIAM J. BROWN,
ATTORNEY GENERAL
STATE OF OHIO
17th Floor
30 East Broad Street
Columbus, Ohio 43215
Defendants

Case No. 78 987399

Amended Complaint
(filed August 22, 1979)

1. Plaintiff is a taxpayer, resident and elector of the Village of Bratenahl, County of Cuyahoga and State of Ohio.

2. Plaintiff brings this class action on behalf of himself and all others similarly situated as residents, taxpayers and electors of the Village of Bratenahl, County of Cuyahoga and State of Ohio.

3. The approximate number of members of this class exceeds 1,000 and is so numerous that joinder of all members is impractical.

4. The questions of law and fact relative to this controversy are common to all members of the class; that Plaintiff's claim is typical to the claim of the class; that Plaintiff will fairly and equitably project the interest of the class.

5. Adjudication as to this Plaintiff would be dispositive of the interest of the other members of this class not parties to this action and the questions of law and fact common to the members of this class predominate any questions affecting individual members and that this class action is the only means available for the fair and efficient adjudication of this controversy.

6. Plaintiff states that the Defendant, the Ohio State Board of Education, under the authority of Section 3311.29 R.C. has issued an order merging the Bratenahl School District with the Cleveland School District; that Section 3311.29 R.C. includes a mandatory directive transferring funds and property of the merging school district to the new school district; that by reason thereof, the transfer order contained in Section 3311.29 R.C. conveys funds and property of the Bratenahl School District to the Defendant, Cleveland School Board, in excess of $1,000,000.00; that Plaintiff and all members of this class, as taxpayers, have an equitable interest in said property

and funds, and that said property and funds are held in trust for them by the Defendant, Bratenahl Board of Education.

7. Plaintiff states that Section 3311.29 R.C., providing for the mandatory transfer of property and funds by administrative order of merger from one school district to another is constitutionally repugnant and in violation of the due process clause of the Constitutions of the United States and the State of Ohio.

8. The transfer and conveyance of said funds and property to the Defendant, Cleveland Board of Education, by reason of said order of merger issued by the Defendant, Ohio State Board of Education, will cause Plaintiff and all members of the class to suffer irreparable damage.

WHEREFORE, Plaintiff demands that the Court adjudge:

1. That Section 3311.29 R.C., authorizing the merger of school districts and including the mandatory transfer and conveyance of funds and property by administrative order from one district to another is unconstitutional.

2. That the order and/or orders pending and issued by the Ohio State Board of Education under authority of Section 3311.29 R.C. are invalid.

3. That the Defendant, Ohio State Board of Education, as well as the Defendant, Cleveland Board of Education and Bratenahl Board of Education, be temporarily restrained and enjoined from enforcing and/or instituting said order of merger, and that said injunctive relief be made permanent upon the final hearing of this cause.

4. That the Court make a determination of the fair and reasonable value of the services rendered by Plaintiff's attorney and that he be granted an order allowing payment of said attorney's fees, together with his costs.

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIDNEY STROMBERG *Plaintiff* v. BOARD OF EDUCATION, VILLAGE OF BRATENAHL, OHIO, et al. *Defendants*	)	**Case No. 78 987399** **Judge Frank J. Gorman** **Motion To Dismiss**

Now comes the Defendant Ohio State Board of Education, and respectfully moves this Court to dismiss the instant action against it because it is entitled to judgment as a matter of law for the following reasons: (1) the matter in issue between the Plaintiffs and the Defendant Ohio State Board of Education has been the subject of a prior final adjudication on its merits by the Ohio Supreme Court as between these parties, rendering the cause of action in the present action res judicata between these parties, (2) in the alternative, Plaintiffs are barred from maintaining this action by the doctrines of laches and equitable estoppel, (3) Plaintiffs have failed to state a claim upon which relief can be granted, and, (4) Plaintiffs do not have standing to maintain this action.

A Memorandum in Support of said Motion to Dismiss is attached hereto and Defendant respectfully requests that said Memorandum also be considered its response to Plaintiffs' Request for Preliminary Injunctive Relief in this action.

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Attorneys for Defendant
Ohio State Board of Education

Respectfully submitted,
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Attorney General

GARY E. BROWN
Assistant Attorney General

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIDNEY STROMBERG, *Plaintiff,* vs. BOARD OF EDUCATION VILLAGE OF BRATENAHL, OHIO and BOARD OF EDUCATION CITY OF CLEVELAND, OHIO and OHIO STATE BOARD OF EDUCATION and WILLIAM J. BROWN, ATTORNEY GENERAL STATE OF OHIO *Defendants.*	)	**Case No. 78 987399**

MOTION OF DEFENDANT, STATE BOARD OF EDUCATION OF OHIO, TO DISMISS THE CROSS-CLAIM OF DEFENDANT, BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT

Defendant, State Board of Education of Ohio, moves this court for an order dismissing the cross-claim of defendant, Board of Education of Bratenahl Local School District against defendant, State Board of Education of Ohio, for the following reasons:

1. The Supreme Court of Ohio in the case of *State ex rel. Board of Education of Bratenahl Local Local School District v. State Board of Education,* 53 Ohio St. 2d 173, decided March 22, 1978, *cert. den.* by United States Supreme Court, October 2, 1978, *specifically held* that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the State Board of Education, and the Bratenahl Board of Education, therefore, lacks the capacity and authority to assert the cross-claim in question.

2. The judgment rendered by the Supreme Court of Ohio, in the case of *State, ex rel. Board of Education of Bratenahl Local School District v. State Board of Education,* 53 Ohio St. 2d 173, decided March 22, 1978, *cert. den.* by United States Supreme Court, October 2, 1978, is *res judicata* with respect to the issues set forth in the cross-claim in question, and the cross-claim, therefore, fails to state a claim upon which relief can be granted.

3. The judgment rendered by the Supreme Court of Ohio in the case of *State, ex rel. Board of Education of Bratenahl Local School District v. State Board of Education,* 53 Ohio St. 2d 173, decided March 22, 1978, *cert. den.* by United States Supreme Court October 2, 1978, renders the issues of the cross-claim concerning the 1974 dissolution order moot, and the cross-claim, therefore, fails to state a claim upon which relief can be granted.

4. The judgment rendered by the Court of Appeals, Franklin County, Ohio, in the case of *State, ex rel. Board of Education, Bratenahl Local School District v. State Board of Education,* Case No. 78AP-414, decided April 29, 1978, is *res judicata* with respect to the issues set forth in the cross-claim in question, and the cross-claim, therefore fails to state a claim upon which relief can be granted.

5. The jurisdiction of the Court of Appeals, Franklin County, Ohio, having been first invoked by the

Board of Education of Bratenahl Local School District in the case of *State, ex rel. Board of Education, Bratenahl Local School District v. State Board of Education,* Case No. 78AP-414 in that court, to determine the issues raised by the Bratenahl Board in its Cross Complaint in the present case, the jurisdiction of the Court of Appeals, Franklin County, Ohio, excludes any other court from adjudicating those issues.

WILLIAM J. BROWN
Attorney General

GARY E. BROWN
Assistant Attorney General

JOHN D. HOLSCHUH
Special Counsel for the
Attorney General
Alexander, Ebinger,
Holschuh, Fisher
& McAlister

Attorneys for Defendant and
Cross-Claim Defendant,
State Board of Education

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIDNEY STROMBERG, *Plaintiff,* vs. BOARD OF EDUCATION, VILLAGE OF BRATENAHL, OHIO, et al., *Defendants.*	)	**Case No. 78-987399**
	)	**Motion To Dismiss of Board of Education, City of Cleveland, Ohio With Brief Attached**

Now comes the defendant, Board of Education of the City of Cleveland (hereafter Cleveland Board), and respectfully moves this Court to dismiss the instant action against it because it is entitled to judgment as a matter of law for the following reasons: (1) it is not a necessary party to the resolution of the issue which is the subject matter of this lawsuit which is solely between the plaintiffs and the defendant Ohio State Board of Education; (2) pertaining to the subject matter of the within cause of action, this defendant has no discretion under the applicable statutes of Ohio within which to act or not act, but is subject solely to the lawful directives of the Ohio State Board of Education; (3) the matter in issue between the plaintiff and the defendants has been the subject of a prior final adjudication on the merits by the Ohio Supreme Court, rendering the cause of action and the present action res judicata; (4) plaintiffs are collaterally estopped from attacking the Ohio Supreme Court's prior adjudication of the issues present in this case; (5) alternatively, plaintiffs are barred from maintaining their action by the doctrines of laches and equitable estoppel; (6) plaintiffs have failed to state a claim upon which relief can be granted, and; (7) plaintiffs do not have standing to maintain this action.

A Brief in Support of this Motion to Dismiss is attached hereto. This defendant respectfully submits that

this attached Brief is also submitted for consideration of the Court as this defendant's response to plaintiffs' Request for Preliminary Injunctive Relief in this action.

Respectfully submitted,
JOHN M. BAKER
Counsel for Defendant
Board of Education,
City of Cleveland, Ohio

Of Counsel:

WESTON, HURD, FALLON, PAISLEY & HOWLEY

STATE OF OHIO } ss:
COUNTY OF CUYAHOGA }

In The Court of Common Pleas
Case No. 987399
Judge Richard M. Markus

SIDNEY STROMBERG
Plaintiff,
vs.
BOARD OF EDUCATION, et al.
Defendants

Order and Judgment

This case is the subject of Motions to Dismiss by the Ohio State Board of Education directed to the complaint filed by the plaintiff and the cross claim filed by the Bratenahl Board of Education. On February 15, 1979, this Court ordered a stay of all proceedings in this case until the Ohio Supreme Court ruled on related litigation. That related case was decided by the Ohio Supreme Court in *State, ex rel. Board of Education of Bratenahl v. State Board of Education,* 58 Ohio St. 189 (decided May 16, 1979).

Following that decision by the State Supreme Court, this Court advised all counsel that final disposition would be made in the present case on May 31, 1979, unless they could present written justification for any other action prior to that date. The Court has received written communications from several counsel. Although this individual judge does not agree with the decisions rendered by the Ohio Supreme Court in litigation involving most of the same parties, this Court is obliged to accept and follow the decisions of the Ohio Supreme Court. Believing that the cited decision by the Ohio Supreme Court causes the issues of the present case to be *res judicata,* this Court is obliged to grant the Motions to Dismiss. The various arguments raised by counsel were or could have been

considered in the related litigation between substantially the same parties. As stated in this Court's previous memorandum, the taxpaper-citizens are bound by litigation involving the governmental entity representing their interests.

For the above reasons this action is dismissed with prejudice at plaintiff's costs.

RICHARD M. MARKUS, Judge

Dated: May 31, 1979

STATE OF OHIO
COUNTY OF CUYAHOGA } ss:

In The Court of Common Pleas Case No. 78-987399

SIDNEY STROMBERG
Plaintiff,
vs.
BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT, et al.
Defendant.

Order

This matter comes before the Court on plaintiff's motion for reconsideration. Although this individual Judge has repeatedly indicated his disagreement with the decisions by the Ohio Supreme Court on this matter, this Court is obliged to accept and follow those decisions. It appears to this individual Judge that the position of the plaintiff and the Bratenahl Board of Education has legal and equitable merit, but an orderly system of justice requires this Court to apply the principles of *res judicata.*

A prior adjudication of the same issues involved here bars relitigation of those issues. For the purpose of *res judicata* principles, issues are the fundamental rights or causes of action, rather than the reasons or grounds for resolving disputes about those rights or causes of action. Issues as to the existence of the Bratenahl School Board or the propriety of a State School Board Order dissolving that district cannot be relitigated on the basis that additional constitutional arguments are being raised in the new litigation. Nor can those basic issues be relitigated on the basis that citizens-taxpayers previously represented by a governmental entity now wish to reassert those claims themselves.

For all those reasons, the previous dismissal was required as a matter of law. Since this Court did consider

the content of the suit decided by the Ohio Supreme Court, one might conclude that the previous order should have been the grant of summary judgment rather than the grant of a motion to dismiss. The law is unclear whether this Court may take judicial notice of related litigation in the State Supreme Court, but there was affidavit evidence before this Court containing the same material. Therefore, the previous order should have read that the motion to dismiss this action is granted, or alternatively, the motion to dismiss is treated as a motion for summary judgment and granted. With that correction and modification, the motion for reconsideration is denied.

RICHARD M. MARKUS, Judge

Date: June 22, 1979.

COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIDNEY STROMBERG *Plaintiff-Appellant* - vs - BOARD OF EDUCATION, ET AL. *Defendants-Appellees*	**Case No. 987399** **Notice of Appeal** (filed June 27, 1979)

Notice is hereby given that Sidney Stromberg, plaintiff, hereby appeals to the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District, from the order and final judgment dismissing plaintiff's complaint with prejudice entered in this action on the 31st day of May, 1979.

JAMES A. CHIARA
Attorney for Plaintiff
1914 Superior Building
815 Superior Avenue
Cleveland, OH 44114
(216) 861-3432

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA
GERALD E. FUERST, CLERK OF COURTS

SIDNEY STROMBERG
Appellant
- vs -
BOARD OF EDUCATION,
ET AL.
Appellees

Court of Appeals No. 41011

Lower Court No. 987,399

Motion No. 45047

Date Aug. 14, 1979
KRENZLER, P. J.:

JOURNAL ENTRY

Sidney Stromberg, a Bratenahl taxpayer, brought a taxpayer's suit attacking the constitutionality of R.C. 3311.29. The lower court dismissed the taxpayer's action on the ground that two Ohio Supreme Court decisions, *State, ex rel. Bd. of Ed. of Bratenahl Local Sch. Dist. v. State Bd. of Ed.* (1978), 53 Ohio St. 2d 173, and *State, ex rel. Bd. of Ed. v. State Bd. of Ed.* (1979), 58 Ohio St. 2d 189, were res judicata of the issue raised. The taxpayer has appealed from the dismissal of its lawsuit, and, in addition, seeks a stay of proceedings during the pendency of this appeal, prohibiting the State Board of Education from taking any action merging Bratenahl Local School District with the Cleveland City School District. The motion for a stay of proceedings is before us at the present time and will be the subject of our ruling herein.

In order to comprehend the nature of the motion, it is necessary to review the lengthy history of the litigation involving the State Board of Education and the Bratenahl School District.

The present controversy has been the subject of litigation for the past eleven years culminating in two decisions by the Ohio Supreme Court, *State, ex rel. Bd. of Ed. v. State Bd. of Ed., supra; State, ex rel. Bd. of Ed. of Bratenahl Local Sch. Dist. v. State Bd. of Ed., supra.* Foremost among the issues presented throughout litigation was that of the forced dissolution of the Bratenahl Local School District due to its non-compliance with R.C. 3311.29.

In 1968, the State Board of Education ordered the dissolution of the Bratenahl school system effective July 1, 1970, as a result of its non-compliance with R.C. 3311.29. While Bratenahl maintained only kindergarten through eighth grades, the statute required all school districts to maintain public schools consisting of grades one through twelve.

On March 22, 1978, in 53 Ohio St. 2d 173, the Ohio Supreme Court held that the July 1, 1970 dissolution order of the Ohio State Board of Education was final and valid, and thus, that the Bratenahl Local School District had been properly dissolved on that date.

After the foregoing decision, the Bratenahl Local School District, not yet having been dissolved, filed additional motions for rehearing and a stay of execution of the judgment. Bratenahl's application to the Supreme Court of the United States for a stay of execution of the judgment of the Supreme Court of Ohio was denied. Bratenahl then sought a writ of certiorari to the U. S. Supreme Court, which was also denied October 2, 1978. 58 L. Ed. 2d 175.

On June 28, 1978, Bratenahl filed a complaint in prohibition and mandamus in the Court of Appeals of Franklin County seeking to enjoin the dissolution of the Bratenahl Local School District and for an order that the State Board of Education act on Bratenahl's request for evaluation and accredition. An appeal from this decision to the Ohio Supreme Court was dismissed sua sponte in a unani-

mous decision. The court held that the complaint failed to state a claim upon which relief could be granted. Moreover, it was held that review of the issues sought to be raised by the complaint were barred by the Ohio Supreme Court decision in *State, ex rel. Bd. of Ed. of Bratenahl Local Sch. Dist. v. State Bd. of Ed.* 1978), 53 Ohio St. 2d 173. *State, ex rel. Bd. of Ed. v. State Bd. of Ed.* (1979), 58 Ohio St. 2d 189.

The earlier decision in 53 Ohio St. 2d 173 was thus held to be res judicata as to the issues raised in the mandamus and prohibition action.

It should be noted that, throughout this eleven-year period of litigation, no decision had ever been rendered with regard to the constitutionality of R.C. 3311.29.

The foregoing summarizes the prior history of the instant case.

The present taxpayer's action was filed in the Common Pleas Court of Cuyahoga County on August 2, 1978, shortly before a decision was due on Bratenahl's petition to the U.S. Supreme Court for a writ of certiorari in 53 Ohio St. 2d 173. Pending the second appeal to the Supreme Court of Ohio, Judge Markus, on February 15, 1979 stayed all proceedings on this case pending another decision by the Supreme Court of Ohio, noting:

> "While the complaint in that new action sounds in prohibition and mandamus, the substance of that action and the relief sought are substantially the same as the action in this Court for injunctive relief. The action filed in Franklin County Appeals Court (which is now on appeal to the Ohio Supreme Court) clearly resembles the present action in this Court, since both actions challenge the 1974 State School Board order and assert the continued existence of the Bratenahl school district."

Following the second Ohio Supreme Court decision in 58 Ohio St. 2d 189, Judge Markus, on May 31, 1979, entered an order sustaining the defendants' motion to

dismiss this action ruling that the Ohio Supreme Court decision caused the issues of the present case to be res judicata. Judge Markus further stated:

> "The various arguments raised by counsel were or could have been considered in the related litigation between substantially the same parties. As stated in this Court's previous memorandum, the taxpayer-citizens are bound by litigation involving the governmental entity representing their interests."

The precise issue in the taxpayer's appeal is whether the statute in issue, R.C. 3311.29, is constitutional. The state's position is that the previous litigation is res judicata of the issue, is binding on the taxpayer, and therefore, that the present appeal should be dismissed and that Judge Markus' decision be affirmed.

Because the present appeal involves two distinct issues, the first being whether the previous litigation is considered res judicata as to the present case, and secondly, whether the present statute, R.C. 3311.29 is constitutional, and because of the imminent nature of this appeal, we have decided in the interests of judicial economy and efficiency to state our views on both issues although we are presently called upon only to consider the motion to stay. We are proceeding in this manner inasmuch as denial of the motion to stay would ultimately moot the issues on appeal because the Bratenahl School System would be dissolved by the time the appeal would be heard and ruled upon.

We have reviewed the past litigation involved in the instant case and it is our conclusion that the issue on appeal could have been raised by the Bratenahl Board of Education in previous litigation. Therefore, the doctrine of res judicata applies to the Bratenahl Board of Education. Further, because the Bratenahl taxpayer was represented by the Bratenahl School District. and the issue of

constitutionality was not raised, the taxpayer is now precluded from raising this issue.

Accordingly, we find that the trial court was correct in concluding that the doctrine of res judicata applies.

As to the issue of constitutionality of R.C. 3311.29, it is noted that a court has the right to determine whether a legislative act, drawn into question in a suit pending before it, is opposed to either the United States or Ohio Constitutions, or both, and to strike down any act which clearly conflicts with the Constitution.

R.C. 3311.29 read as follows during the relevant period:

> "§ 3311.29 School district must maintain public school; exceptions.
>
> "No school district shall be created and after July 1, 1968, no school district shall exist which does not maintain within such district public schools consisting of grades one through twelve, inclusive, and any such existing school district not maintaining such schools after such date shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily, which order shall provide an equitable division of the funds, property, and indebtedness of the dissolved school district among the districts receiving its territory. The state board of education may authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable.
>
> "The superintendent of public instruction is without authority to distribute funds under sections 3317.02 and 3317.06 of the Revised Code to any school district which after July 1, 1968, does not maintain schools with grades one through twelve, inclusive, and to which no exception has been granted by the state board of education."

We have reviewed the language of this section. It is our view that the provisions of R.C. 3311.29 are clear, definite and unambiguous, fair and reasonable, and not arbitrary or discriminatory. Therefore, we hold that R.C. 3311.29 is constitutional.

The motion for stay of proceedings is denied.

KRUPANSKY, J.,
CORRIGAN, J., Concur

ALVIN I. KRENZLER
Presiding Judge

Dated:
August 14, 1979

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 41011

SIDNEY STROMBERG, *Appellant,*	**Appeal From Common Pleas Court No. 987,399**
— vs —	
BOARD OF EDUCATION et al., *Appellees.*	**Journal Entry And Opinion**

Date December 6, 1979
COOK, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This is an appeal from a judgment dismissing appellant's complaint on the basis of res judicata.

Appellant, a resident and a taxpayer of the village of Bratenahl, filed a taxpayer's suit in the Cuyahoga County Common Pleas Court seeking a declaration that R.C. 3311.29 is unconstitutional because it is in contravention of the Constitutions of the State of Ohio and the United States. The trial court dismissed appellant's action on the ground that two Ohio Supreme Court decisions, State ex rel. Bd. of Ed. of Bratenahl Local Sch. Dist. v. State Bd. of Ed. (1978), 53 Ohio St. 2d 173 and State ex. rel. Bd. of Ed. v. State Bd. of Ed. (1979), 56 Ohio St. 2d 189, were res judicata of the issue raised.

The appellant has filed five assignments of error, but, in reality, they are but one assignment of error, to-wit: The trial court erred in dismissing appellant's complaint.

The sole issue in the cause sub judice is whether the previous litigation is res judicata as to the issues raised in appellant's complaint, as found by the trial court.

In State ex rel. Bd. of Ed. of Bratenahl Local School District v. State Bd. of Ed. supra, at 178, Supreme Court of Ohio stated that the Bratenahl Local School District "was properly dissolved on July 1, 1970 by the state board". In State ex rel. Board of Education of Bratenahl v. State Board of Education, supra, the Ohio Supreme Court again held that the Bratenahl School District was dissolved as of July 1, 1970.

It is true that the issue of the constitutionality of R.C. 3311.29 was not raised in any of the previous litigation involving the dissolution of the Bratenahl School District and its merger with the Cleveland School District.

The doctrine of res judicata has been part of the law of Ohio for many years and is rooted in Roman Law. See State ex rel. Ohio Water Service Co. v. Mahoning Valley Sanitary District, 169 Ohio St. 31, 34 (1959). The doctrine was explained in Grant v. Ramsey, 18 Ohio St. 158 (1857), as follows:

> "We may remark, in the words of Lord Kenyon, that 'if an action be brought, and the merits of the question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although perhaps some objection or argument might have been waged upon the first trial which would have led to a different judgment.' In such a case, the matter in dispute having passed in rem judicatam, the former decision is conclusive between the parties, if either attempts, by commencing another action, to reopen the question."

The doctrine of res judicata has been held to bar a subsequent action between the same parties or *their privies*

based upon the same cause of action as to all germane matters that were or could have been raised in the earlier action. See City of Cincinnati, ex rel. Crotty v. Cincinnati, 50 Ohio St. 2d 27 (1977); State ex rel. Ohio Water Service Co. v. Mahoning Valley Sanitary District, supra. (emphasis added)

It is obvious that the Bratenahl Board of Education had an opportunity to raise the question of the constitutionality of R.C. 3311.39 in the previous litigation involving said Board in the Supreme Court of Ohio but did not do so. Any action by said Bratenahl Board of Education raising a question of the constitutionality of R.C. 3311.39 would be barred by the doctrine of res judicata.

Appellant argues that, while the doctrine of res judicata may apply to the Bratenahl Board of Education, it does not apply to appellant because he was not a party to said litigation.

However, as stated above, the doctrine of res judicata applies to the same parties *or their privies*. As to whether appellant, as a resident citizen and taxpayer of the Bratenahl Local School District, is a privy of the Bratenahl Board of Education, we conclude the question must be answered in the affirmative in light of City of Cincinnati ex rel. Crotty v. Cincinnati, supra, where the court said at page 28:

> "It is a generally accepted rule that in absence of fraud or collusion, a judgment for or against a governmental body, such as a municipal corporation, is binding and conclusive as res judicata on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest, except where the proceedings were not of an adversary character."

The Bratenahl Board of Education is a governmental body. As a resident, citizen and taxpayer, appellant was represented, as to Bratenahl Local School District matters, by the Board of Education of said district.

We conclude the trial court properly dismissed appellant's taxpayer suit on the basis of the doctrine of res judicata.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

O'Neill, P.J.
Donofrio, J. and
Cook, J. Concur

Robert E. Cook,
Judge

Dated:
December 6, 1979

PROPOSITIONS OF LAW SET FORTH IN THE MEMORANDUM IN SUPPORT OF JURISDICTION DATED JANUARY 29, 1980 AND FILED BY SIDNEY STROMBERG IN THE SUPREME COURT OF OHIO

SIDNEY STROMBERG, *Appellant,* vs. BOARD OF EDUCATION, et al., *Appellees.*	**C.A. No. 41011** **Memorandum In Support of Jurisdiction**

Proposition of Law No. 1:

The Doctrine of Res Judicata has no Application to an Administrative Order or Adjudication that Violates the Provisions of the Due Process Clauses of the Constitutions of the United States and the State of Ohio.

Proposition of Law No. 2:

An Adjudication or Order Rendered Under Authority of a Void Statute is not Res Judicata of the Issue of Unconstitutionality when it is Raised in a Different Cause of Action.

Proposition of Law No. 3:

In the Absence of a Voluntary Agreement to Merge, the Order of the State Board of Education Providing for an Equitable Distribution of the Property, Assets and Indebtedness of the Dissolved School District into the Merging School District Under Authority of Section 3311.29 of the Revised Code, that Makes no Provision for a Hearing and an Opportunity for Review in any Court, Amounts to the Delegation of a Purely Arbitrary and Unconstitutional Power.

Proposition of Law No. 4:

In the Absence of a Voluntary Agreement to Merge, the Order of the State Board of Education Providing for an Equitable Distribution of the Property, Assets and Indebtedness of the Dissolved School District into the Merging School District Under Authority of Section 3311.29 of the Revised Code, Constitutes an Unlawful Delegation of a Judicial Power.

Proposition of Law No. 5:

Revised Code Section 3311.29, Authorizing an Administrative Dissolution and Merger of a School District, and the Transfer of Assets to the Newly Created District, Violates Article VI, Section 3, of the Ohio Constitution.

June 20, 1978

THOMAS V. KOYKKA, Esquire
Arter & Hadden
1144 Union Commerce Bldg.
Cleveland, Ohio 44115

Re: Board of Education, Bratenahl Local School District v. State Board of Education of Ohio, et al., A-1066

Dear Mr. Koykka:

Your application for stay in the above-entitled case has been presented to Mr. Justice Stewart, who has endorsed thereon the following:

"Application denied
June 19, 1978
Potter Stewart"

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

LAURENCE P. GILL
Deputy Clerk

th

cc: JOHN D. HOLSCHUH, Esquire
Alexander, Ebinger, Holschuh,
Fisher & McAlister
17 South High Street
Columbus, Ohio 43215

THOMAS V. KOYKKA, Esquire
Arter & Hadden
1144 Union Commerce Bldg.
Cleveland, Ohio 44115

Re: Board of Education, Bratenahl Local School District v. State Board of Education of Ohio, et al., A-1066

Dear Mr. Koykka:

The Court today entered the following order in the above-entitled case:

"The application for stay of the judgment of the Supreme Court of Ohio, presented to Mr. Justice Stevens and by him referred to the Court, is denied."

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

FRANCIS J. LORSON
Deputy Clerk

cc: JOHN D. HOLSCHUH, Esquire
Alexander, Ebinger, Holschuh,
Fisher & McAlister
17 South High Street
Columbus, Ohio 43215

TABLE OF CONTENTS AND QUESTIONS PRESENTED SET FORTH IN THE PETITION FOR WRIT OF CERTIORARI DATED AUGUST 1, 1978 AND FILED BY BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT IN THE SUPREME COURT OF THE UNITED STATES (BRATENAHL I)

PETITION FOR WRIT OF CERTIORARI 1

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A. In This Proceeding, the State of Ohio has Undertaken to Destroy the 80-Year Old Bratenahl School System and to Take Its Property, Without the Due Process Guaranteed by the Fourteenth Amendment 2

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2. In a separate declaratory judgment action before the proceeding now here for review was commenced, it was adjudicated by final judgment that the Bratenahl Local School District legally exists 6

C. In the Present, Subsequently Commenced Proceeding Now Here for Review, the State of Ohio Has Further Deprived Bratenahl of Due Process by Depriving It of Rights Under the Prior Judgments 7

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1. By state action Bratenahl is destroyed and despoiled of its property 16

2. The most elementary demand of due process, here denied, is notice and hearing 17

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4. Failure to give effect to the change in the law is a denial of due process 21

CONCLUSION 22

QUESTIONS PRESENTED

This case brings here for review the questions:

1. Whether a State denies due process within the meaning of the Fourteenth Amendment when, without notice or hearing, and without judicial review, it orders dissolved an 80-year old public school district and orders its assets transferred to another district.
2. Whether a State denies due process within the meaning of the Fourteenth Amendment when it denies *res judicata* effect to prior final judgments on the same issue between the same parties.
3. Whether a State denies due process within the meaning of the Fourteenth Amendment when it applies prior law, subsequently changed, and fails to apply the law in effect at the time of decision.

OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 2, 1978

JOHN D. HOLSCHUH, Esq.
Alexander, Ebinger, et al.
17 South High St.
Columbus, Ohio 43215

Re: Board of Education Bratenahl, Ohio, Local School District v. State Board of Education of Ohio, et al., No. 78-170

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

J. H. LAZOWSKI
Assistant Clerk

Ohio Revised Code (Eff. 12-1-67)

§ 3311.29 School district must maintain public school; exceptions.

No school district shall be created and after July 1, 1968, no school district shall exist which does not maintain within such district public schools consisting of grades one through twelve, inclusive, and any such existing school district not maintaining such schools after such date shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily, which order shall provide an equitable division of the funds, property, and indebtedness of the dissolved school district among the districts receiving its territory. The state board of education may authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable.

The superintendent of public instruction is without authority to distribute funds under sections 3317.02 and 3317.06 of the Revised Code to any school district which after July 1, 1968, does not maintain schools with grades one through twelve, inclusive, and to which no exception has been granted by the state board of education.

Ohio Revised Code (Eff. 9-30-75)

§ 3311.29 School district must maintain public school; exceptions.

Except for a joint vocational school district, no school district shall be created and no school district shall exist which does not main' in within such district public schools consisting of grad. . kindergarten through twelve and any such existing school district not maintaining such schools shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily, which order shall provide an equitable division of the funds, property, and indebtedness of the dissolved school district among the districts receiving its territory. The state board of education may authorize exceptions to school districts where topography, sparsity of population, ar l other factors make compliance impracticable.

The superintendent of public instruction is without authority to distribute funds under sections 3317.022 [3317.02.2] to 3317.025 [3317.02.5] of the Revised Code to any school district that does not maintain schools with grades kindergarten through twelve and to which no exception has been granted by the state board of education.

WISS, APPELLEE *v.*
CUYAHOGA COUNTY BOARD OF ELECTIONS, APPELLANT.

[Cite as Wiss v. Bd. of Elections (1980),
61 Ohio St. 2d – (published OHIO BAR, Vol. LIII,
No. 11, March 17, 1980)]

Mandamus – Elections – To compel restoration of candidate's name to ballot – Properly denied, when – Nominating petition invalid.

(No. 79-1476 – Decided March 12, 1980.)

APPEAL from the Court of Appeals for Cuyahoga County.

On November 2, 1979, R. Garin Wiss, appellee herein, initiated an original action in mandamus in the Court of Appeals, seeking an order requiring the Cuyahoga County Board of Elections to restore his name to the ballot as a candidate for the Cuyahoga County Board of Education at the November 6, 1979, general election. The board had determined that the appellee's nominating petition was invalid and had removed his name from the ballot for the reason that, as a resident of the village of Bratenahl, appellee would be ineligible to serve as a member of the county board of education if elected.

On November 5, 1979, the Court of Appeals granted the writ of mandamus and ordered the board of elections to place appellee's name on the ballot as a candidate for the Cuyahoga County Board of Education at the November 6, 1979, election. The board of elections was further ordered to count the votes cast for such office, but to withhold certification of the results until the status of the Bratenahl Local School District had been adjudicated.

The cause is now before this court upon an appeal as of right.

Messrs. Wegman, Hessler & Vanderburg and *Mr. Daniel D. Wilt,* for appellee.

Mr. John T. Corrigan, prosecuting attorney, and *Mr. David A. Williamson,* for appellant.

Per Curiam. As a resident and elector of the village of Bratenahl, appellee would be ineligible to be a member of the Cuyahoga County Board of Education under R. C. 3311.05 and 3311.052 if the Bratenahl Local School District has been dissolved and its territory merged with that of the Cleveland City School District.

The questions before the court are then: (1) Has the Bratenahl Local School District been dissolved; and (2) if so, did the board of elections properly rule appellee's nominating petition invalid?

I.

The status of the Bratenahl Local School District has been the subject of extensive litigation, some continuing. *State, ex rel. Bd. of Edn.* v. *State Bd. of Edn.* (1978), 53 Ohio St. 2d 173, certiorari denied, 439 U.S. 865 (*Bratenahl I*), *State ex rel. Bd. of Edn.* v. *State Bd. of Edn.* (1979), 58 Ohio St. 2d 189 (*Bratenahl II*), *Wilt* v. *State Bd. of Edn.* (C.A. 6, 1978), 608 F. 2d 1126, *Stromberg* v. *Bd. of Edn.*, Cuyahoga County Ct. of App., Case No. 41011, pending.

A review of these cases shows that the status of the Bratenahl School District has been established and the same was dissolved on July 1, 1970, and the issue is *res judicata.*

In *Bratenahl I, supra,* the court stated at page 178:

". . . This court concludes that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the state board."

Appellee argues (correctly) that the law of a Supreme Court case is stated in the syllabus thereto and concludes (incorrectly) that since the quoted language is not in the syllabus it is of no effect. The syllabus of a case must be read in light of facts in the case. In *Bratenahl I, supra,* the

determination that the Bratenahl School District had been dissolved in 1970 was a *sine qua non* underpinning to the court's syllabus. Should there be any question concerning whether this court arrived at such a determination, it was dispelled by this court's blunt statement in *Bratenahl II, supra,* at page 190:

"The decision of this court, on March 22, 1978, in *State, ex rel. Bd. of Edn., supra (Bratenahl I, supra),* held that the 1970 refusal of the state board to grant an extension was not 'appealable,' and that the school district was properly dissolved on July 1, 1970."

In *Wilt* v. *Bd. of Edn. supra,* the federal circuit court also found this issue to be *res judicata.*

Appellee insists that the Bratenahl controversy is still alive because the constitutionality of R. C. 3311.29, the statute empowering the state board to dissolve the Bratenahl School District, is under attack in *Stromberg, supra,* a case pending in the Cuyahoga County Court of Appeals.

This rationale for qualifying the Bratenahl Issue as viable is tenuous at best. An allegation of unconstitutionality of a statute in a case pending in a lower court is not justification for overturning a determination twice made by this court.

II.

R. C. 3311.052 requires that members of a county board of education are to be elected ". . . from the qualified electors *residing in the county school district territory,*" and "county school district" as defined in R. C. 3311.05, in part, as "[t]he territory within the territorial limits of a county, *exclusive of the territory embraced in any city school district.* . . ." (Emphasis added).

Appellee has stated in his complaint that he is a ". . . qualified elector of the Village of Bratenahl, Ohio." Therefore, since the Bratenahl School District has been

dissolved and its former territory merged with the Cleveland City School District, appellee is ineligible to serve on the Cuyahoga County Board of Education.

In this case, the board of elections, *sua sponte,* reviewed the sufficiency of appellee's petition papers and found them wanting due to appellee's residence outside the territorial area of the office to which he sought election. Such spontaneous action by a board without a prior protest has been recognized by this court in *State, ex rel. McGinley* v. *Bliss* (1948), 149 Ohio St. 329. This action by the board is authorized by the broad grant of power vested in it by R. C. 3501.11 which states:

"Each board of elections . . . shall:

". . .

"(K) Review, examine, and certify the sufficiency and validity of petitions and nomination papers."

There is no requirement of notice and hearing in R. C. 3501.11(K) and this court has refused to read one into it, *McGinley, supra.*

Absent any allegation of fraud, it would seem incongruous to give a board of elections power to review nominating petitions without also giving it the right to disqualify a potential nominee when, on its face, his nominating petition indicates his ineligibility for the office that he seeks.

Accordingly the judgment of the Court of Appeals is reversed, and the writ of mandamus is denied.

Judgment reversed.

CELEBREZZE, C. J., HERBERT, W. BROWN, P. BROWN, SWEENEY, LOCHER and HOLMES, J. J., concur.

Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1979
No. 79-1288

ETHAN WILT and HEATHER WILT, TEREASA RACINSKAS and ADAM RACINSKAS, CHRISTOPHER BOEMAN and THOMAS BOEMAN, KATHLEEN TOKE, SHAWN MACK and ANDREA MACK, REGINA HARRIS, DEJONA CEASOR, CORA OWENS, TIMOTHY J. COSGROVE, DANIEL WILT and PEGGY WILT, BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT,
Petitioners,

vs.

STATE BOARD OF EDUCATION, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, BOARD OF EDUCATION, CLEVELAND CITY SCHOOL DISTRICT, VINCENT C. CAMPANELLA,
Respondents.

BRATENAHL REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The short answer to the opposition filed by respondents is that given by the State Court of Appeals to like maneuvering by the State Board. As the court put it:

> "When one travels upon the wrong road, he usually arrives at the wrong destination." (A47.)

Consider first—

1. The Spurious Issue Of Res Judicata

The State Board, the State Superintendent, and the Cleveland Board are in lockstep marching down that wrong road. They call it res judicata.

Respondents, understandably, never come to grips with, or even mention, one stubborn fact*: they do not explain how an adjudication (by the Supreme Court of Ohio) that the court *"lacked subject matter jurisdiction"* (A82) can, on any reasoned basis, be transformed into an adjudication that Bratenahl was dissolved ten years ago.

Where there is no jurisdiction, there can be no res judicata. This is true no matter how many times the error is repeated, and no matter how many courts of whatever degree so say.

Federal law controls that which is res judicata within the federal courts. The federal courts below dismissed this action on the ground that *Bratenahl I* and *Bratenahl II* were a proper basis for the application of res judicata. The error is plain, since those cases held only that the courts of the State of Ohio lacked subject matter jurisdiction. Now, another wrench is in the works—*Wiss v. Cuyahoga County Board of Elections,* 61 Ohio St. 2d 298 (1980).

Wiss is, of course, the law of Ohio. However, it cannot control federal law upon res judicata. The case retroactively interprets *Bratenahl I* as holding that the courts of Ohio were without subject matter jurisdiction because the merits had been adversely resolved against Bratenahl. The logic is facially absurd.

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*"There is nothing like a fact. Clean or grubby, Slim or Chubby, There is nothing like a fact." Judge Simon H. Rifkind, in Counsel on Appeal, p. 170.

A court with the power to hear a controversy can determine the merits. The converse is not true. *Wiss* states that Bratenahl could not invoke subject matter jurisdiction because somehow the state judicial system (which lacked jurisdiction) had determined the merits adversely to Bratenahl. If this be so, how did the state court assume the power to determine the merits?

Within the constraints of the Constitution, the Ohio Supreme Court can establish the state's law of res judicata. The involuted logic of *Bratenahl I* and *II* and *Wiss*—that the Court's adverse ruling upon the merits is the *"sine qua non* underpinning" of its determination of no subject matter jurisdiction—should not infect the federal law on res judicata.

The law has always been clear, previously, that a determination of the power to hear a controversy precedes a hearing of the controversy, and that a determination of a lack of subject matter jurisdiction cannot be the basis of res judicata. In the federal courts, only a decision upon the merits by a court with jurisdiction over the subject matter can be the basis of res judicata.

The respondents' argument fails to reveal the legal sleight of hand by which they urge that the individual petitioners "had an opportunity to present" (Opposition of State Board, 8) their claims in the state litigation to which only the Bratenahl Local School District was party. Bratenahl, as a political subdivision of the State of Ohio, has limited rights under the U.S. Constitution. *Hunter v. Pittsburgh,* 207 U.S. 161 (1907). Since the individual petitioners could not have asserted their present substantive and procedural due process claims under the Fourteenth Amendment through Bratenahl, they must be able to do so in this action without the bar of res judicata.

The claim of res judicata is a spurious one.

However, Bratenahl does agree that—

2. One Final Judgment Ought to Be Enough

There is such a judgment. It was entered August 30, 1973, in the declaratory judgment action (A38), upon Opinion issued January 9, 1973. (A28-35.) It is a final judgment, never modified, never reversed. It is true res judicata. It adjudged:

> "Bratenahl in fact does exist and is operating as a school district and at present maintains schools with grades 1 through 12." (A33.)

That is a judgment not mentioned by respondents; it is a judgment the Federal Court was obligated to respect, and that it did not do so, underscores the denial of rights that has resulted.

3. The Case Merits This Court's Attention

If review is denied, "the persistence of the State Board in its efforts to avoid determination upon the merits" (A35) will have achieved the destruction of a first-rate school system, where integration works. The State Board will have brought that result about without any inquiry into the merits of Bratenahl's case.

The merits of Bratenahl's right to live have been inspected by the courts in five cases. In every one of the five, a *decision on the merits has upheld Bratenahl.* Four of those decisions have been wiped out by the Ohio Supreme Court's adjudication that the Court:

> "lacked subject matter jurisdiction * * *." (A82.)

On adjudication, the judgment in the declaratory judgment case *was not wiped out.* It never went to the Supreme Court. It stands of record, unmodified, and final.

The four decisions on the merits that the Ohio Supreme Court wiped out on the ground the court lacked jurisdiction are:

1. The judgment of January 9, 1973, in the first administrative appeal. (A28-35.)
2. The judgment of December 16, 1976, in the second administrative appeal. (A40-68.)
3. The judgment in two separate mandamus actions entered December 22, 1976 (A90) upon Opinion issued December 16, 1976. (A87-90.)

No case has resulted in a judgment on the merits in favor of the State Board. Until and unless that happens, Bratenahl is entitled not to have the school system it has supported since 1890 destroyed by an adjudication of which the Court "lacked subject matter jurisdiction." (A82.)

4. The Case Presents No Problem of Mootness

In hope, at any cost, to escape the painful prospect of being forced, at long last, into a courtroom to answer *on the merits,* the State Board mistakenly contends the case is moot; it says "dissolution and merger have already taken place." The fact is that *to this very moment the Bratenahl School System remains functionally intact and independent of the Cleveland system into which the State Board would force Bratenahl.* Even during the long months the Cleveland schools were shut tight by the teachers' strike only lately ended, the Bratenahl schools continued full operation. The only education going on in public schools was in Bratenahl.

There is no problem of mootness. The case will become such only if the State Board succeeds in finally preventing inquiry by any court into the merits.

CONCLUSION

A school system that has flourished since 1890, that has solved the problems of integration, and for the continued existence of which the community has voted a bond issue, constructed a model new high school building, and successfully operated it for ten years, ought not to be condemned to die by default—without inspection by any court of the merits of its claim to live (except by one whose final judgment upholding the school is ignored).

The writ should issue and the case be summarily remanded for trial on the merits of the civil rights claims asserted by these petitioners.

Respectfully submitted,

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